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General

The editors-in-chief of the Ontario Family Law Monthly (OFLM) are David Frenkel and David Tobin.

Various authors contribute to the text of the OFLM.

The articles in the OFLM are offered to educate, engage and inspire.

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The non-depletion order: A helpful tool to protect future payments

David Frenkel

Overview

Lippa v. Jawanshir (2023 ONSC 5852) answered the question what is a client to do when an ex-spouse deleteriously depletes a jointly held asset without consent. Justice Emery reviewed the relevant sections of the *Family Law Act* and summarized the factors to consider when determining this issue and balancing the competing interests.

Introduction

In *Lippa*, the husband had depleted $116,000 from a joint line of credit that had a zero balance as of separation date. Originally, the wife brought an early case conference in Brampton Court in July 2023 when the husband had by that time withdrew $68,000. It appears that the earliest motion date that the wife was able to obtain was in October 2023. Leading up to the motion date, the husband had also listed for sale a condominium investment property in his name. The condo had $400,000 equity in it and the wife was concerned that the husband would deplete that money as well. Consequently, she added a further claim to her motion for a Certificate of Pending Litigation to be placed on the condo.

The Family Law Act

We are reminded in *Lippa* that s.12 of the *Family Law Act* permits a court to restrain the depletion of a spouse's property in order to protect the other spouse's interests.

As pointed out in *Lasch v. Lasch* (1988 CarswellOnt 235 (Ont. SC.)), the purpose of an order under s. 12 is to ensure that there are sufficient assets to make an equalization payment. Waiting until the trial may be too little too late.

In *Radosavljevic v. Radosavljevic* (1986 CarswellOnt 296 (Ont. SC) at para. 9), Labrosse J. held that the s.12 order in that case was necessary to protect the wife and to prevent her claim to equalization from being entirely defeated.

Therefore, the onus turns on the defendant to show that they have enough assets at trial to satisfy any potential payment owing.

S.40 of the FLA also provides jurisdiction for a court to make a non-depletion order if that depletion would impair or defeat a claim for child or spousal support.

Factors in granting a non-depletion order

There are also additional factors that the court will consider when deciding whether to grant the non-depletion order.

Those factors as pointed out in *Bronfman v. Bronfman* (2000 CarswellOnt 4622 (ON SC)) are as follows:

- the legal threshold to meet before obtaining a s.12 preservation order is a "very low one" and is different than the requirements to meet for a *Mareva* injunction;
- bare allegations are not enough since the court does not issue orders restraining people from dealing with property without some evidence;
- the spouse seeking the non-depletion order has the onus to show *prima facie* that they are likely to receive an equalization payment equal to the value of the specific assets;
- as with any interlocutory injunction, the exercise is one of balancing risks; namely, the risk of waiting to trial and the judgment not being able to be satisfied versus restraining a defendant's assets that would ultimately be shown that they have a right to do; this balance is satisfied with the following checklist:
    - the relative strength of the plaintiff's case;

        - i.e. how likely is it that the plaintiff spouse will receive an equalization payment
    - the balance of convenience (or inconvenience);
        - what effect will granting or not granting the non-depletion order will have on the parties
    - irreparable harm.
- if a spouse that is asking for the non-depletion order will be entitled to an equalization payment, considerable weight will be given to this factor and perhaps less weight to the other factors;

In *Lippa*, Justice Emery ultimately ordered at the motion that the husband's ability to draw down on the line of credit is frozen and effective immediately.

With respect to the amounts the husband already drew down, they would be subject to post separation adjustments he may be ordered at trial to repay to the wife.

Discussion

It is interesting to see from this decision the length of time that it took for the wife to obtain relief, namely, three months. That is a long time when one is worrying how much their ex-spouse will deplete their joint asset by. He could have depleted all of it.

What made matters more complicated was that the husband was unemployed and claimed he needed the line of credit to pay for his expenses. However, at the motion, the court found that the husband had other income to meet his needs.

Therefore, one of the lessons from *Lippa* is that family law counsel should think about the big picture of their case early on in their retainer. If one solely focuses on exchanging disclosure and crunching the numbers without considering future events, their clients may be stuck holding the bag at the end of the day along with a large legal bill (or as mentioned in *Bronfman*, a Pyrrhic victory).

Instead, put your client's case through a stress test of sorts by thinking about various scenarios that could occur at the end of the day. For example, what if the ex-spouse sells a property behind everyone's noses? What would happen if the spouse claims bankruptcy?

Also, assess the actions of the ex-spouse and see whether there are reasons to be concerned even before your client raises a claim of non-depletion. For example, in *M.B. v. D.B.* (2023 PESC 39), Justice Clements granted the wife's preservation order and took into account the following concerning behaviour by the husband:

- he failed to pay spousal support and child support for a year after the separation date;
- husband's potential addiction issues;
- his failure to make two significant loan payments; and,
- significant sums being withdrawn from the accounts over a relatively short period of time.

Further, keep in mind that a non-depletion order can be obtained on consent and therefore, a wisely crafted offer to settle may go a long way to obtain the relief being sought and minimizing unnecessary litigation costs for possibly an urgent motion. For example, in *Kuang v. Young*, 2023 ONSC 2429, the parties consented to interlocutory orders for non-depletion of assets pending a motion.

With respect to the extent of the non-depletion order, one can also carve out exceptions to it if there are important payments that may need to be made from a certain account. This occurred in *Meffe v. Meffe* (2023 ONSC 3195) where Justice Sharma ordered the self-represented husband at the conclusion of trial not to deplete an investment account until the issue of costs was determined. However, the court did permit him to draw from that account for the purpose of paying any balance owing on a particular credit card.

Discussing these and similar issues early on with a client will likely result in productive conversations that will give them client confidence in the overall process. It will also increase counsel's peace of mind knowing that they are looking at both the small and big picture of their family law case.

Varying a temporary parenting order? Very hard and very rare.

David Tobin

Overview

This article highlights the current test which must be met if a party is to successfully vary a temporary parenting order.

While case law suggests two different tests, there is much to be gained by synthesizing them and demonstrating to the court that since the making of the previous temporary parenting order, there has been a material change in circumstances, reasonably affecting the best interests of the child, **and** there is compelling reason that the temporary parenting order ought to be changed.

Introduction

A high bar exists for those who seek to revisit a temporary parenting order prior to trial. The policy reasons behind the difficulty in varying temporary parenting order are 1) children have a need for stability, so multiple changes are not ideal; and, 2) children are well served by an expeditious resolution of family law matters, and so proceedings that delay or lengthen proceedings will not be in children's best interests.

Temporary orders are regarded as "a reasonably acceptable solution to a difficult problem until trial." As such, there is a heavy onus on a party who seeks to vary a temporary order "essentially replacing one imperfect solution with another imperfect solution pending trial." (*EN v SN*, 2023 ONSC 4480).

Counsel must pay attention to whether the temporary parenting order which is being varied was made under the *Divorce Act* or the *Children's Law Reform Act* ("*CLRA"*). Justice Finlayson in *B.R.M. v. M.A.E.M.* (2021 ONSC 2791) noted that the *CLRA* and the *Divorce Act* contain different statutory language about variations of interim orders,

although the applicable legal principles in the case law decided under either piece of legislation are not necessarily different.

Section 29 of the *CLRA* provides that a court shall not make an order varying an order in respect of custody or access unless there has been a material change of circumstances that affects or is likely to affect the best interests of the child.

There is some dispute as to the source of the jurisdiction to vary temporary parenting orders under the *Divorce Act*. Some cases note that the jurisdiction is found in section 17, wherein it states a "…court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively … (b) a parenting order..." However, other courts note that in the *Divorce Act* a "*parenting order*" means an order made under subsection 16.1(1), i.e. not an interim order as set out in subsection 16.1(2).

Whether or not section 17 can ground the request to vary a temporary order, there is no dispute that the Superior Court of Justice has the jurisdiction to vary a temporary parenting order made pursuant to the *Divorce Act*. As Justice Gautier held in *Lagrandeur v. Lagrandeur* (2017 ONSC 6967), "[t]he case law has consistently recognized that courts have jurisdiction to vary interim orders, even if the relevant statute is silent as to that issue."

Whether under the *Divorce Act* or the *CLRA*, there are two general judicial approaches to motions to vary temporary parenting orders. The first line of cases requires that there is a **material change in circumstances, reasonably affecting the best interests of the child**. This is a threshold question, and if it is found that there has been a material change, the judge must then conduct a "fresh inquiry" into the best interests of the child. This appears to be the favoured, current approach, and has also been articulated as a material change compelling a change in the best interests of the child (*Radojevic v. Radojevic*, 2020 ONSC 5868) To be clear, it is not just a reassessment of the child's best interests: A material change must be found before a best interests inquiry can be conducted.

The second approach requires that there is a **compelling reason that the temporary parenting order ought to be changed**. This "compelling reason" must be directly related to the best interests of the child. (*Calabrese v Calabrese*, 2016 ONSC 3077)

The two approaches are not dissimilar, both revolving around the best interests of the child. Much of the recent case law synthesizes the approaches, such that a party likely must demonstrate that there is a **material change in circumstances, reasonably affecting the best interests of the child, and there is compelling reason that the temporary parenting order ought to be changed**.

The law is clearly stated in *Radojevic v. Radojevic* (2020 ONSC 5868) and *Miranda v. Miranda* (2013 ONSC 4704 at para. 26). In *Miranda*, Justice Mitrow has the following to say:

> A party wishing to disturb an interim status quo or vary an interim order faces a strong onus to produce cogent and compelling evidence to show that the physical, mental and moral welfare of a child would be in danger in maintaining the status quo: *McCarthy v. Scheibler*, 1999 CarswellOnt 3419 (Ont. S.C.J.) at para. 14. Variation of interim custody and access orders will usually only succeed if a child is at risk, or for some other compelling reasons. There is a presumption in favour of the status quo absent compelling reason to change the status quo: *Gusikoski v. Gusikoski*, 2001 CarswellSask 323 (Sask. Q.B.) at para 10. In *Green v. Cairns*, 2004 CarswellOnt 2322 (Ont. S.C.J.) at para. 14, Wood J. referred to the well-founded reluctance by courts to vary interim orders on an interim basis and stated that an interim order should only be varied on an interim basis where the evidence establishes "clearly and unequivocally" that the present arrangement is not in a child's best interests. In *Greve v. Brighton*, 2011 CarswellOnt 8814 (Ont. S.C.J.), Ricchetti J., after reviewing various authorities, states at para. 24 that **on a motion for an interim order to vary an existing interim order, the court should only do so where the moving party has demonstrated a change in circumstances as a result of which there are compelling reasons to vary the interim order to meet the child's best interests**. (emphasis added)

Justice Kaufman has described, in brief, the circumstances that are necessary as "extenuating," and being those that are "material, substantially important or compelling." (*Lamacchia v Carullo*, 2022 ONSC 687)

Another recent helpful articulation from Justice Kurz, drawing on many authorities, can be found in *Thomas v. Wohleber* (2022 ONSC 1258). The test was set out as follows:

1. Whether there has been a "change in the circumstances of the child" since the time of original order.
2. That change must be a material one; i.e. one that materially affects the child: *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] S.C.J. No. 52 (S.C.C.), at para. 10. That means that the change must be "substantially important": *McIsaac v. Pye*, 2011 ONCJ 840, at para. 13;
3. That material change must raise "exceptional circumstances where immediate action is required": *Grant v. Turgeon*, 2000 CanLII 22565 (ON SC), [2000] O.J. No. 970 22565 (S.C.J.), *Southorn v. Ree*, at para. 12.
4. The order that those materially changed circumstances compel the court to make must meet the best interests of the child: *Miranda v. Miranda*, 2013 ONSC 4704, at para. 26, *Radojevic v Radojevic , ibid, Chyher v. Al Jaboury,* 2021 ONSC 8191, at para. 15, citing the previous decision in the same case at 2021 ONSC 4358 at para. 26, *Greve v. Brighton*, 2011 ONSC 4996, at para 24.

While there are differing articulations of the test for bringing motions to vary an interim parenting order, in effect, they are not all that different. They emphasize that the focus is to be on the children, and the impact of a change or circumstance on the children, rather than the effect that they will have on the parents.

There is a high onus for litigants seeking to challenge or revisit temporary parenting orders. Maintaining the status quo is seen as being better for both parties and the court system as a whole: It provides children with stability and encourages parties to move toward the resolution of their matter. Such an approach also saves legal fees and court resources and is undoubtedly better for the mental health of the parties than constantly reopening orders that were intended to be interim.

It is clear that it is not in a child's best interests to, as Justice Kurz put it in *Radojevic,* "leave it open to deep pocketed and litigious parents to continuously litigate without having to bother to go to trial."

Qualifying expert witnesses and family law business valuations

Christina Hinds

Overview

This article will set out the factors that the court considers when qualifying an expert witness in the context of business valuations. When recommending business valuators to clients, or advising on a client's valuator of choice, it is important to keep these factors in mind. In the recent Superior Court of Justice decision of *Ierullo v. Ierullo et al* (2023 ONSC 5390), the court declined to qualify the Respondent's proposed witness.

Introduction

In Ierullo, both parties retained valuators to provide an opinion on the value of the Respondent's business as of the date or marriage and the valuation date. A voir dire was held before Justice Jarvis with respect to the qualifications of the Respondent's proposed expert witness. After setting out the threshold requirements for expert evidence admissibility, Justice Jarvis ultimately declined to qualify the expert witness proposed by the Respondent.

Threshold Requirements

The threshold requirements for expert evidence admissibility are set out in *R. v. Mohan* (1994 CanLII 80 (SCC)) and are: (a) relevance; (b) necessity; (c) absence of an exclusionary Rule; and (d) a properly qualified expert. It was the last requirement – a properly qualified expert – that was at issue in *Ierullo*. (at para. 3)

The *Mohan* factors have since evolved to a two-step analysis as set out in *White Burgess Langille Inman v. Abbott and Haliburton Co*. (2015 SCC 23). At step one, the

court must apply the *Mohan* factors. At step two, the court must exercise its discretion and balance the risks and benefits of admitting the evidence – the "gatekeeping" stage. (at para. 3)

A Properly Qualified Expert

In considering the last requirement of the *Mohan* factors, Justice Jarvis reviewed the testimony of the Respondent's proposed expert witness, which included the following: (at para. 8)

- He graduated from a university in the United States with a business related bachelor of arts degree and worked in the banking industry after graduating.

- He later obtained a Certified Financial Analyst designation ("CFA") and a few years later joined a leading US investments advisory firm.

- He had taken various Canadian securities/investment courses.

- The proceeding was the first time he had been retained to undertake a valuation for litigation purposes and as an expert in a business valuation for family law purposes.

- In the same year that he delivered his valuation reports, he began studying for his CBV accreditation. He wrote the exam the following year but did not pass. He re-wrote the exam days before trial and was awaiting his results.

- In July 2023 (a few months before trial), he was accredited as a Certified Valuation Analyst and Financial Modelling and Valuation Analyst in the United States.

- He had never been qualified as a witness in any court proceeding.

Justice Jarvis also noted that there was no evidence that he had received mentorship in the area of family law business valuations. (at para. 9)

Justice Jarvis considered *Laderoute v. Heffernan* (2019 ONSC 914) wherein Justice Summers declined to qualify a proposed expert witness. Justice Jarvis noted the similarities between *Laderoute* and the present case. In *Laderoute*, the proposed expert witness was a CPA (not a CBV) and had not prepared any prior valuations for family law purposes. (at para. 10)

In declining to qualify the proposed expert witness, Justice Summers stated that: "In my view, business valuation is a highly specialized area of the accounting profession. It is a pursuit that is often described as being an art as well as a science." Justice Summers also noted that there was a personal relationship between the party and the proposed witness.

In *Denman v. Radovanovic* (2022 ONSC 4401), Justice Ferguson declined to qualify the proposed expert witness in part because the witness had a personal relationship with the party that had not been disclosed in any of the reports.

Justice Jarvis noted that the Respondent's proposed expert witness had not disclosed his personal relationship with the Respondent in any of his reports or in his Acknowledgement of Expert's Duty.

Discussion

As Justice Kurz pointed out in *R.L. v. M.F.* (2023 ONSC 2885) with reference to *Family Law Rule* 20.1(2), any litigation or court appointed expert has a duty to provide the court with "evidence that is fair, objective and non-partisan". Kurz J. also provided an important quote from the *White Burgess* SCC decision:

> The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in

> the sense that it does not unfairly favour one party's position over another. **The acid test is whether the expert's opinion would not change regardless of which party retained him or her**. (emphasis added)

As counsel, we also play an important role when we use an expert witness to assist the trier of fact. In *Signalta Resources Limited v. Canadian Natural Resources Limited* (2023 ABKB 108 at para. 48), Justice Sidnell of the Alberta Court of King's Bench provided a helpful summary for counsel when using expert witnesses:

> Counsel have an obligation to ensure that:
>
> (a) the expert's opinion and report comply with the evidentiary and procedural rules;
>
> (b) the expert is impartial, independent and there is an absence of bias in the expert's opinion;
>
> (c) the expert's opinion is relevant, clear, comprehensible, and accessible;
>
> (d) the expert's opinion is devoid of jargon and unexplained scientific terms and concepts;
>
> (e) the expert's report is written from the perspective of the trier(s) of fact being the reader;
>
> (f) the expert evidence sets out the expert's opinion in a manner that makes sense to a lay person;
>
> (g) the expert clearly identifies the facts or assumptions upon which the opinion is based;
>
> (h) the expert does not fail to consider material facts that may be contrary to the expert's opinion;
>
> (i) there is a transparent explanation for the expert's analysis, reasoning, and conclusions in the written report and oral testimony;
>
> (j) the expert's testimony does not go beyond the scope of the expert's expertise; and
>
> (k) the expert understands that, if the expert's opinion changes after the preparation of a report, the expert has an obligation to disclose that change of opinion…

Even when counsel agree on each other's expert witnesses, the court still retains the right to assess their admissibility. This occurred in *Khaira v. Ghumman* (2022 ONSC 7165) where Justice Sanfilippo assessed the admissibility of the opinion evidence of Darren Miles and Matthew Krofchick (both Chartered Business Valuators) in accordance with the two-stage test in *R. v. Abbey* (2017 ONCA 640).

In *Ierullo,* Justice Jarvis declined to qualify the Respondent's proposed expert witness, noting his lack of credentials, no prior experience in business valuations for family law experience and lack of mentorship in the area, and his undisclosed personal relationship with the Respondent:

> "Bottom-line, [the Respondent] proposes to have qualified as an expert an unsuccessful CBV candidate with no litigation support experience and who possess virtually none of the qualifications (i.e., CA, CPA) or experience commonly expected of a business valuation expert and with whom she has had a four to five year social relationship. A court must have confidence in a proposed expert's qualifications and objectivity. This court does not have that confidence in Mr. Martin. He is not qualified to provide expert opinion evidence about the value of Ierullo's business interests." (at para. 16)

As business valuations are common in family law matters, it is important that family lawyers recommend valuators that have sufficient experience and credentials. Family lawyers must remember the following:

- If any personal relationship exists between the proposed witness and your client, disclose it in advance.
- While a CBV designation is not required, the proposed expert's prior training, experience, and credentials should be relevant to business valuations for the purpose of family law litigation.
- Without prior experience in family law litigation, experts may be expected to have sufficient guidance or mentorship in this specialized area.

Are you seeking unequal division of NFP? Try shocking the court's conscience!

Amruta Ponkshe

Overview

It is common knowledge that when a marriage ends, property gets divided. Section 5 of the *Family Law Act* deals with the equalization of net family properties upon the breakdown of a relationship. The general rule for the division of property, as set out in subsection 5(1), is that the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

But that is not always the case. In appropriate situations, judges in Ontario have granted one spouse an amount that is more or less than one half the difference between the two net family properties, deriving their authority to do so from section 5(6) of the *Family Law Act*.

This article discusses recent and more familiar cases in how courts exercise their discretion and implement uneven sharing of wealth. This uneven sharing can arise from a spouse's financial malfeasance including reckless depletion of wealth and incurring disproportionately large debts.

When can a court award unequal division?

Section 5(6) of the *Family Law Act* discusses eight situations where an equalization payment may be varied:

> The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

c) the part of a spouse's net family property that consists of gifts made by the other spouse;

d) a spouse's intentional or reckless depletion of his or her net family property;

e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;

f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

g) a written agreement between the spouses that is not a domestic contract; or

h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

The Test of Unconscionability

In *Serra v. Serra* (2009 ONCA 105), the Ontario Court of Appeal, at para. 47, discussed that the test for "unconscionability" under section 5(6) is a high one. The jurisprudence is clear that circumstances which are "unfair", "harsh" or "unjust" alone do not meet the test. To cross the threshold, an equal division of net family properties in the circumstances must "shock the conscience of the court".

In *Smith v. Smith* (2012 ONSC 1116), Justice Chappel held as follows as para. 23:

> The test of unconscionability is not met by showing that equalization would lead to hardship to one spouse, or by the fact that an equalization payment would leave the parties with a difference net worth. Nor is it met by simply demonstrating that an equalization of net family properties would be unfair, harsh, inequitable or unjust. In order to satisfy the test of unconscionability, the circumstances of the case must be such that equalization would be "repugnant to anyone's sense of justice"

In *Merklinger v. Merklinger* (1992 CanLII 7539 ONSC), a husband's conduct, particularly in relation to his dealings with the parties' $1.1 million cottage, which he finagled to acquire from a bank for less than two thirds of its value, led Justice

Jennings to grant an unequal division of the parties' net family properties in the wife's favour. At para. 54, Justice Jennings stated:

> Section 5(6) permits me to order an unequal allocation of value if to do otherwise would be unconscionable. The legislature deliberately chose to strictly define the severity of the application of section 5(1) which must pertain before there can be any judicial intervention. The result must be more than hardship, more than unfair, more than inequitable.

Justice Jennings' decision was upheld by the Ontario Court of Appeal in *Merklinger v. Merklinger* (1996 CanLII 642 ON CA).

In *Cosentino v. Cosentino* (2015 ONSC 271), Justice Perkins clarified that the list of considerations in determining whether the threshold has been crossed is not open ended. All of the provisions of section 5(6) are directly linked to the impact on one of both spouses' debts, liabilities and property. A general sense of outrage, absent a clear connection to the parties' debts, liabilities and property, is not sufficient. It is the financial result, the result of the usual NFP equalization that must be unconscionable, after taking into account only the eight enumerated considerations, nothing else.

N.R.I.H. v. M.G.S.H. (2015 ONSC 3277) involved a claim by the wife that the husband had sexually assaulted her the night before the parties separated and that the parties' net family property should be divided unequally. The basis of the wife's claim was that it would be unconscionable for the husband to receive any portion of the family assets, given his lack of contribution to the marriage and conduct on the evening before the parties' separation. While Justice Wildman held that the evidence adduced by the wife fell short of establishing that the husband had sexually assaulted her, her Honour further elaborated that even if that finding had been made, the court could not impose a financial punishment on him by varying his share of the net family property. To do so would consider conduct that was not related in any way to the property that the parties had on the date of separation.

Justice Wildman reiterated at paragraph 291 that there is nothing in paragraph 5(6) that give the court some general authority to punish a spouse for objectionable conduct by varying his or her equalization payment.

Steps to follow

Before determining whether an unequal division of net family property is ordered, the court must first determine the net family property of each spouse at valuation date. Next, the court determines the equalization payment. Finally, the court determines whether the equalization would be unconscionable, in accordance with the factors set out in the Act: see V*enton v. Venton* (2015 ONSC 4705), at para. 93

Restrictions on "more or less than"

Subsection 5(6) provides that the court may award an amount that is more or less than half of the difference between the parties' net properties. There is no restriction or cap on the "more than" and, therefore the *Act* does not limit the award to 100 per cent of the difference between their net family properties. If the difference between their net family properties is zero, a court may still award more than that amount, although the payment cannot exceed the total value of a spouse's net family property: see *Czieslik v. Anyso* (2007 ONCA 305) at paras. 25, 35 and 36; *Ottewell v. Martin* (2023 ONSC 5696) at para. 21.

Recent Decisions discussing Unequal Division of NFP

Moretti v. Moretti

The parties in *Moretti v. Moretti* (2023 ONSC 5240) were married for fourteen years and had a son who, though an adult, continued to be "a child of the marriage" because of his autism. The wife sought retroactive and continuing child and spousal support, equalization, and a 50% interest in the matrimonial home. The husband argued that the wife had dissipated family assets to the tune of $5 million because of

her gambling addiction. He relied on subsections 5(6) (d) of the FLA to claim that the wife's reckless and intentional depletion of her net family property that this disentitled her to an equalization payment, spousal support, and child support.

While the wife admitted to having a gambling problem, she had failed to take any steps to address it. She argued that the husband knew, approved, and encouraged her gambling. However, Justice Sugunasiri held that that fact that the husband might have driven her there at a time when the extent of the gambling was not obvious did not lead to his condonation.

Further, the husband had to sell a property and take out a line of credit against another property, totalling to approximately $580,000, to help the wife meet loan repayment obligations she had to friends.

Her Honour concluded that the husband took on a greater burden to assist the wife despite her gambling. The wife recklessly depleted funds that could have provided for her retirement and care of the party's son. Justice Sugunasiri accepted the husband's NFP calculation of $238,308.29 but reduced the wife's entitlement to zero asserting that the wife's behaviour had shocked the court's conscience, and an unequal division was warranted.

Choudhury v. Awal

In *Choudhury v. Awal* (2023 ONSC 4064), Justice M. Fraser was presented a claim from the husband for an unequal division of the parties' net family properties based on an apparent $69,000 he asserted the wife removed from a bank account prior to the parties' separation. The wife maintained that the funds removed from the account were, in part, provided to the husband, applied toward debt for mutual benefit and to finance one of the parties' trips to Bangladesh.

Her Honour concluded that the husband's evidence on the issue fell woefully short and did not approach a finding of unconscionability.

Her Honour reminded readers at paragraph 128 that although unconscionable conduct is an appropriate consideration in carrying out the analysis required under section 5(6), the true target of the section is a result that is unconscionable to one of the parties.

Osborne v. Shevalier

In *Osborne v. Shevalier* (2022 ONSC 73), the wife sought an unequal division of net family property alleging that without her knowledge and contrary to the husband's assurances that the parties were financially secure, the husband withdrew approximately $99,000 from his RRSP over the course of the parties' seven-year marriage.

After reviewing the evidence adduced by each party, Justice Sproat concluded that the parties were always living beyond their means and that at its highest, the husband told the wife not to worry about finances and that things would be fine. The finances were largely open to the wife.

There was no evidence to suggest that the husband had a covert lavish lifestyle. The wife had at least partially contributed to the parties living beyond their means by purchasing a new vehicle in priority to paying down debts.

The RRSP withdrawals benefitted the wife by funding living expenses, reducing family debts or enhancing the value of family assets. As such, there were no grounds for ordering an unequal division of net family property.

Conclusion

Clients may find making a claim for uneven sharing of wealth very appealing monetarily, but as family lawyers, it is our duty to remind them that misbehaviour or negative actions by a spouse are not enough to meet the test of unconscionability.

Determining an unequal division of property is a fact-specific exercise and the onus of meeting the test of unconscionability for unequal division of net family property lies with the party requesting the variation – a bar much too high to achieve in most circumstances.

The best interests of the child: Lessons in co-parenting and shielding children from conflict

Samantha Rich

Overview

Justice Tweedie's recent decision of *Cameron v. Luckhardt* (2023 ONSC 5477) is a helpful illustration of how the court interprets and applies the best interests of the child factors as enumerated in *Section 16* of the *Divorce Act*. The court in *Cameron* also shows how the behaviour of both parents play an important role in making a final order relating to decision making and parenting time.

Willingness of Each Parent to Support the Child's Relationship with the Other Parent

Section 16(3)(c) of the *Divorce Act* states that, "In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including … each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse."

Justice Tweedie reviewed both the mother and father's behaviour in assessing their respective willingness to support the children's relationship with one another.

She found that when the mother, "excludes the father from the children's lives, she minimizes the father's contribution to the children's lives, and she minimizes importance of him in the children's lives." (at para. 22)

She found that the mother had a history of denying parenting time and not following court orders relating to parenting time. The mother "… did not have the best interests of the children in mind when she discusses with them whether or not they should go for parenting time with the father." (at para. 23)

She also found several examples where the mother's behaviour was problematic. These included her referring to the children as "my children", her failure to inform the father of the birth, her failure to cooperate with the application to change the child's last name to be inclusive of both parent's last names, and her creating more responsibility for herself by denying the father parenting time. (at para. 25)

In reviewing the father's behaviour, the court found that the father's, "actions demonstrate that he does not provide the mother with information and uses the scheduling of his parenting time as a means to cause problems for the mother. This is not child focused and results in the children being placed in the middle of the parents' conflict…"

The court found that the father's behaviour was rigid and inflexible, and that he prioritized his parenting time over the children's established activities and schedules. Justice Tweedie found that the father would not respond to the mother's questions about access exchanges or notify the mother regarding who was picking the children up for scheduled visits, if not him. The father also did not provide the mother with information to enable her to meet the needs of the children when they were returned to her. (at para. 26)

Overall, the court found that both parents' behaviour was problematic.

The Parents' Ability to Shelter the Children from the Conflict

Section 16(3)(i) of the *Divorce Act* states that, "… the court shall consider all factors related to the circumstances of the child, including … the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child."

Justice Tweedie assessed both parents' ability to shelter the children from the conflict by looking at their past behaviour. She cited *Mattina v. Mattina* (2018 ONCA 641) at para. 21:

> ... Exposure to conflict has been called the "single most damaging factor for children in the face of divorce"…

In *Cameron*, the mother, "admitted that she would have had conversations with friends within earshot of the children, during which she complained about the father." (at para. 29)

On the other hand, the father also admitted to taking video and audio recordings of the children regarding parenting time and during exchanges. Justice Tweedie cited *Whidden v. Ellwood* (2016 ONSC 6938) in expressing her displeasure regarding parents taking photographs and videos during access exchanges at para. 96:

> Parents in custody disputes really need to stop taking photographs and videos of one another during access exchanges.
>
> a. They should stop pretending they're assisting the court by assembling important evidence.
>
> b. The obvious reality is that taking videos is a strategic act of aggression and escalation. The situation never improves when people pull out cameras. Usually it gets worse. Indeed, often that appears to be the intention.
>
> c. Access exchanges in high conflict files are already tough enough for children. Pointing a camera -- or multiple cameras -- at the interaction merely heightens the child's unease and worry that something bad is expected to happen. That someone they love is about to misbehave. That one parent is trying to get the other parent in trouble.
>
> d. Videos recklessly and maliciously transform an ideally brief, benign transition into a horribly unhappy and frightening experience for the helpless child. The unpleasant confrontation may last only minutes. But the emotional devastation for the child can extend for hours, both before and after the exchange…

Justice Tweedie also reviewed the reports made to the Children's Aid Society by both the mother and the father. The Children's Aid Society reported that they were, "concerned about how much the children knew about the ongoing court proceedings and the conflict. They recommended counseling for both children..." (at para. 37)

Moreover, the police were called for assistance in enforcing parenting time on three occasions, without consideration of the impact on the children. Unsurprisingly, the court found that police involvement had been inappropriately requested and had involved the children in the parent's conflict. As a result, a police enforcement clause was not ordered as per the father's request. (at paras. 38 - 53)

The Father's Relationship with the Children

Section 16(3)(b) of the *Divorce Act* refers to, "… the nature and strength of the child's relationship with each spouse ..."

Regarding the father's relationship with Keira, Justice Tweedie emphasized the importance of parents adjusting their parenting techniques as children get older:

> The parents have different parenting styles. This creates some challenges in co-parenting, particularly for the stricter parent, who, in this case, is the father. Parenting is hard. **As children age, parenting techniques must change to respond to the child's increasing desire for independence and self-autonomy**. **Sometimes, a parent must try several discipline strategies before finding one that works**. Instead of reflecting on why his discipline might not be working and persevering, the father told Keira she was not welcome back in his home. The father showed little to no insight into the potential impact on Keira of his refusal to have her attend his house. He made no comment that he could or should have done things differently. He, the parent, put the onus on Keira to re-initiate the relationship. (at para. 59) (emphasis added)

The court affirmed that, "A parent must not just accommodate access, they must facilitate it." (at para. 67) She found that the mother was not encouraging of the relationship between Keira and her father, and that she, "is a passive observer of the deterioration of the relationship and does little to assist and foster its improvement." (at para. 68) That being said, Justice Tweedie found no parental alienation to have occurred. (at para. 80)

The Children's Cultural Upbringing and Heritage

According to *Section 16(3)(f)* of the *Divorce Act,* the court shall consider, "… the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage."

Justice Tweedie affirmed the importance of children being exposed to and involved in both of their parent's cultural heritage at para. 103:

> **The mother is White and is not Jamaican, and because of this alone, the mother is not able to provide the level of connection to culture and heritage that is provided by the father**. While she may be aware of appropriate hair care, she did not speak at all about other aspects of Jamaican and Black culture and any actions she has taken to connect the children to that culture. She does not frequently socialize with Black or Jamaican people and so neither do the children when they are in her care. The mother has not had the same life experiences, as a White person, that the father has had, being Black. **She is unable to provide the same support and guidance to the children as the father, while the children navigate the challenges they may face being biracial**. (emphasis added)

She cited *NS v. RM (*2021 ONSC 4566) in emphasizing the importance of children connecting with their cultural heritage:

> If the father is to have the opportunity to teach the children about their Inuit heritage, he must have the opportunity to **meaningfully immerse them in family and community events**, and perhaps to travel with them to Labrador, where he is from. (at para. 36)

She found that, "it is in the children's best interests that the father's parenting time is expanded such that he is able to maintain their connection to their Black and Jamaican heritage and provide support to them as they navigate being biracial in a world where bias and racism still exists." (at para. 105)

A similar example where culture was part of the discussion, albeit in a relocation case, was Justice Akazaki's decision of *Shipton v. Shipton* (2023 ONSC 1342). In *Shipton*, the importance of a child being exposed to both their parent's heritage and cultural identity was emphasized:

> … **the religious and homogenous community proposed for the child's upbringing is ill-equipped to support a biracial female from different faith backgrounds** … The very fact that the child, as a Torontonian, can pursue so many paths and experiment safely with so many aspects of her potential identity, make it difficult to see how she would benefit from the relocation. (at para. 81) (emphasis added)

Conclusion

In applying the *Section 16* factors, the court in *Cameron* decided that the children's primary residence would remain with their mother as this had been the status quo for some time, and until the trial, the father had not sought more time with the children. The court also awarded sole decision making to the mother.

A prominent theme of the case was the conflict that the children were regularly exposed to. Unfortunately, both parents were unable to shield the children from their conflict.

It is therefore vitally important that children are sheltered from conflict during litigation proceedings. The words of Justice Chappel in *SVG v. VG* (2023 ONSC 3206) are a helpful reminder:

> …. the exposure of children to high levels of conflict "**is the single most damaging factor for children in the face of divorce**." … **children's exposure to conflict can significantly undermine their overall functioning and well-being** … **courts deciding parenting matters have a positive obligation to lift children out of the sea of conflict** that too often characterizes Family Law cases … if parties are unable to safeguard children from conflict, the **court must take matters into its own hands** by uncovering and exposing the sources of the conflict and imposing terms targeted at eliminating those causes … that in framing the terms of a parenting order,

> **shielding children from conflict must always take priority** over parental rights, preferences and convenience, and it may be necessary for the sake of the child to impose terms that are costly and challenging for parties to accept and comply with … (at para. 114) (emphasis added)

Cameron teaches us an important lesson in advising clients on parenting cases. It is a helpful reminder to advise clients as early as possible on what is appropriate and inappropriate behaviour relating to parenting and communication with ex-spouses.

One can argue that not providing a client with such advice can have real consequences at trial when a judge assesses the behaviours of both clients.

Emailing a client a checklist or a link to a helpful resource is a good start. But, as the case progresses, counsel should also listen to the unfolding events and provide specific advice and guidance so that the client can learn from any mistakes and improve as they go.

Hopefully, with enough discussion and guidance, the client will improve their communication and co-parenting skills and shield children from conflict.

Y.H.P. v. J.N.: A recent response to an extreme "campaign" of parental alienation

Ainsley Doell

Overview

In the recently released decision *Y.H.P. v. J.N.* (2023 ONSC 5766), Justice Kraft significantly varies a final parenting order to respond to a mother's "campaign of alienation" against a father. This article will discuss the drastic and rare outcome of this case as a thoughtful addition to the case law on parental alienation.

Introduction

The October 2023 edition of the OFLM discussed reunification therapy as a remedy for parental alienation by looking at *C.B. v. E.G.* (2023 ONSC 1571). In that case, Justice Bale found that it was not in the best interests of a mature minor to be ordered to attend reunification therapy aimed at mending her relationship with her father. It was noted that such orders ought to be rare.

On October 16, 2023, one of these 'rare' orders was made by Justice Kraft in *Y.H.P. v. J.N.* (2023 ONSC 5766). Not only was an intensive reunification therapy program ordered, but the primary residence of the child was reversed, and a 120-day black out period was instituted, preventing contact between a mother and her 12-year-old daughter, "S."

While this result may seem drastic, Justice Kraft's thorough and thoughtful decision responds to an extreme "campaign of alienation". She also sets out the urgent intervention that is needed to remove the child from long-term harm.

The decision in *Y.H.P. v. J.N.* acts as a counterbalance to *C.B. v. E.G.*, providing an example of the circumstances in which such an invasive order may in fact be in a child's best interests.

Case Overview

Y.H.P. v. J.N. was a motion to change proceeding, within which the applicant father brought a motion seeking temporary variation of a final parenting order.

The final order, made on consent in 2017, provided for joint custody (now, decision-making responsibility). However, at the time of the motion to change, the father had not had any in-person parenting time with S. since the beginning of the Covid pandemic. He had agreed to this arrangement on a temporary basis to protect his daughter's health, as he continued to work in-person at his dental practice.

When the father began requesting in person parenting at the beginning of 2022 as Covid restrictions were being lifted, the mother refused. When he began his motion to change, the mother began making various allegations that the father had abused S. Some of these allegations had been raised before the final parenting order was made in 2017, but they had been investigated and not verified. Regardless, her position on the motion was that S. did not want to see her father, and that she was mature enough to make this decision herself.

On the basis that the mother was engaging in parental alienation, the father sought a variation for S. to have primary residence with him and for a 120-day black out period during which he and his daughter would attend Building Family Bridges: a four-day intensive program designed to address fractured parent-child relationships.

Justice Kraft set out three issues that needed to be decided in dealing with the motion:

a. In what circumstances can a Court make a temporary variation of a final parenting order?
b. Do the facts of the case meet the more stringent test applicable when a parent seeks a temporary variation of a final parenting order, such that the circumstances are so compelling and of an exceptional nature that they require an immediate change?
c. If the answer to b. is yes, it is in S.'s best interests for her primary care to be changed to the primary care of her father, with an order that the mother have

> no contact with her for at least 120 days to address the parental alienation experienced by S (at para. 6).

Ultimately, the father was successful. Justice Kraft found that the facts were so compelling and exceptional in nature, and the alienation was so severe, that not making the temporary order sought by the father would cause S. emotional harm (at para. 7). There was significant evidence contradicting the mother's accounting of events and suggesting that the daughter's perception of reality was being manipulated. The matter's litigation history was also reviewed, revealing that the mother has a history of non-compliance with orders and interfering with the father's parenting time.

This article will be focusing on Justice Kraft's analysis of issues b. and c.

Circumstances of a compelling and exceptional nature

The test to be met for varying a final parenting order is:

(1) There must be a material change in circumstances since the last order was made…
(2) If a material change in circumstances has been established, the court then embarks on a fresh inquiry into the best interests of the child (*Y.H.P. v. J.N.* at para 22, citing *F.K. v. A.K.*, 2020 ONSC 3726 at paras. 48-58).

If the change sought is temporary in nature, the test is even more "stringent," requiring the circumstances to be so compelling and exceptional in nature that an immediate change is *required* in order to respond to a "situation of actual or potential harm, danger, or prejudice for the child; of such nature or magnitude that immediate rectification or correction are required to safeguard the child's best interests"? (*F.K. v. A.K.*, 2020 ONSC 3726 at para. 52).

These "exceptional circumstances" may extend beyond risks to the child's physical and emotional well-being, but ought to be rare (*Y.H.P. v. J.N.* at para. 23, citing *S.H. v. D.K.*, 2022 ONSC 1203 at para. 40).

YHP provides a comprehensive overview of the above test and the different factors at play, such as the "gravitational pull" of the parenting status quo and evidentiary issues arising from untested affidavit material.

Justice Kraft finds that this heavy onus is met in this case on the basis of the following material changes:

- it was not contemplated, at the time of the final order, that a pandemic would occur and interfere with the parenting plan;
- it was not foreseeable that S. would refuse to spend time with her father, given the loving and affectionate relationship that they shared at the time the order was made; and
- it was not contemplated that the mother would exclude the father from decision-making (for example, unilaterally terminating S.'s therapy).

The urgency of the matter came from Justice Kraft's finding of parental alienation, and that if change was not made now, S. would likely lose her ability to have a meaningful relationship with her father.

This finding of alienation is supported by a host of alienating behaviours on the part of the mother and alienated behaviours exhibited by S.

The list of the mother's 'alienating behaviours' was lengthy, and included:

- insisting that S. ought to be able to make her own decisions regarding contact with her father and refusing to facilitate parenting time or comply with orders on that basis;
- a lack of concern about the severe deterioration of S.'s once-close relationship with her father. The mother maintains that the father abandoned S., despite clear evidence to the contrary;

- actively encouraging her daughter to report abuse that had not been verified in the past. When investigations were closed, she would bring the same complaints to different child protection organizations. She has done this to such an extent that S. now believes that she was abused. Particularly disturbing was Justice Kraft's note that the mother's encouragement of abuse allegations led to S. undergoing multiple invasive medical examinations. These allegations were often made immediately prior to the father's scheduled parenting time and cited as an excuse to withhold S.;
- isolating S. by keeping her from in-person learning with limited opportunities for socialization, which was in part due to the mother's paranoia surrounding S.'s allergies. The precautions she took were unsupported by the evidence of her daughter's medical professionals;
- unilaterally terminating S.'s therapy when her therapist seemed encouraging of the resumption of in-person parenting time with her father; and
- sabotaging reunification therapy and portraying the father as a dangerous individual in front of S.

S.'s notable 'alienated behaviours' included:

- a one-sided view of her parents where her father has been vilified;
- rude, aggressive, hostile behaviour toward her father without feelings of guilt;
- the false belief that she was abused by her father, resulting from her mother's manipulation;
- her allegations of abuse revealed a "manipulated perception of reality": her recounting of 'abusive' events was at times contradicted by evidence; and
- her interviews with Children's Aid workers and therapists appeared "artificial" and "coached". She was unable to recall the context of her allegations. The reunification therapist reported that during a meeting, S. read her complaints about her father directly off of a paper, but could not recall what was written there once that paper was taken away.

Justice Kraft noted that the case law recognizes four possible orders once a finding of parental alienation has been made, per the guidance of expert Dr. Fidler:

a. Do nothing and leave the child with the alienating parent;
b. Do a custody reversal by placing the child with the rejected parent;
c. Leave the child with the favoured parent and provide therapy; or
d. Provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.

While reunification therapy was part of the order made, in this case, that was not sufficient to undo the risk harm faced by S.
It was noted that in this case, the mother had demonstrated that she was not going to comply with orders and had already sabotaged reunification therapy while S. remained in her care.

Justice Kraft looked at case law where a change in "custody" was granted and case law where it was declined. Through this careful consideration of the case law, Justice Kraft notes that the court has found parental alienation to rise to the level of emotional abuse. In one such case, the mother would not help "rectify" the situation and instead used the police to "thwart the father's access" – facts which are more than a little similar to those at hand. The mother was granted no access outside of that necessary to attend counselling (at para. 51).

Justice Kraft suggests that this interference with the father and daughter's relationship post-separation may constitute "family violence", and that the impact of this violence ought to be considered in assessing the mother's ability to meet S.'s needs. She also finds it appropriate to consider the mother's past conduct, as it is directly relevant to this assessment (at paras. 55-61).

The court had the benefit of the clinical analysis of a reunification therapist, who stated that the mother "appears to dismiss information provided by professionals that do not verify her fears of physical, sexual, and emotional abuse" (at para. 29 j.). The

impact that this behaviour had on S. calls into question the mother's ability to act in her daughter's best interests.

In this context, it appears clear that S. was not thriving in her mother's care and that the court could not be content doing nothing.

The role of the views of the child in cases of parental alienation

As part of the proceedings, the mother brought a cross-motion seeking an updated section 112 assessment and/or a Voice of the Child Report. This was not the first time that the mother raised this issue. Earlier this year, Justice Akazaki presided over a contempt motion brought against the mother for failing to comply with the parenting terms that were in place at that time.

In response to the mother's cross-motion, Justice Akazaki stated that "there is no place for a child advocate if the purpose of the referral is to help the child continue an unhealthy course of behaviour" (at para. 19).

As was discussed in OFLM 2023-10., the views of a child and their "claims to autonomy", especially as they get older, may be at odds with the court's duty to "act protectively" (*C.B. v. E.G.* at para. 22; discussing *A.M. v. C.H*).

In *C.B. v. E.G.*, the views and preferences of the child carried considerable weight: She was 'mature minor,' and while it was clear that the parent-child relationship had been fractured, there was no finding of parental alienation made (despite the fact that neither parent was 'blameless').

The facts of *Y.H.P. v. J.N.* are different: S. is considerably younger, and there was a clear finding of parental alienation made.

Both the *Divorce Act* and the *Children's Law Reform Act* call for a child's views and preferences to be taken into account in determining their best interests, in accordance with their age and maturity. However, the fact that S. clearly expressed that she did not want to see her father was not decisive here because it was clear that

S.'s views and preferences were not her own, but rather were a product of the manipulative actions of her mother.

The order

Perhaps the most impressive part of the decision in this case is the level of attention to detail in the order that was made by Justice Kraft.

The shortest terms are those that place S. in her father's primary care and grant him sole decision-making.

There are many additional terms providing specifics for therapies (including requiring therapy for the father and mother individually) and enforceability.

Given the mother's history of disregarding court orders, it is clear that attention was paid to introducing terms that would encourage compliance. The order provides that if the mother breaches the 120-day no-contact order, the 120-day period restarts. Further, it provides that the court will not revisit the parenting arrangements until the mother "engages and meaningfully participates in therapy to gain insight in her alienating behaviour".

Not without any leniency, the order also provides for flexibility so that the father can arrange parenting time for S. and her mother before the black out period has elapsed if it is determined, in consultation with S.'s care providers, that doing so is in her best interests.

Conclusion

As seen in *C.B. v. E.G.*, the fact that a parent-child relationship has been fractured is not the only factor at play in deciding whether to order reunification therapy.

In analyzing S.'s best interests, Justice Kraft focused on the mother's ability to meet her needs, rather than on the state of S.'s relationship with her father. The impact that her behaviours had on the parent-child relationship was just one element; also

significant was the impact that her behaviours had on S herself– for instance, the repeated exposure to invasive medical examinations for the purpose of thwarting court-ordered parenting time. Justice Kraft noted the long-term detrimental impact of being exposed to the mother's "destructive" parenting (at para. 66).

This case makes it clear that reunification therapy is just one piece of the puzzle in addressing parental alienation: these orders are useless if they are not enforceable. In *C.B. v. E.G*, Justice Bale made this point with respect to a mature minor's willingness to cooperate. In *Y.H.P. v. J.N.*, this point is made again, but this time with respect to the parents' willingness to facilitate the process.

Litigants and litigators alike would do well to consider the feasibility of these orders in their particular cases, and whether there are any additional provisions necessary to facilitate them. They would also do well to remember that these orders are intended to be reserved for rare circumstances and made "sparingly" (*Testani v.* Haughton, 2016 ONSC 5827).

It is clear that there is no easy decision to make in circumstances such as these. As Justice Kraft highlights, there is no question that the order that was made will be extremely difficult for mother and daughter in the short-term. However, the courts adopt a protective role over vulnerable individuals such as children. Not allowing a variation of the parenting order would have run contrary to this responsibility: the short-term difficulties faced by the daughter pale in comparison to the long-term harm that she was facing.

A decision of this magnitude is not made lightly, and it is clear that Justice Kraft took care in crafting a judgement with enough caveats that it would be enforceable and workable. It was firm given the mother's history of disregarding orders, but left room for the mother to be incorporated back into S.'s parenting under the right circumstances.