ONTARIO
BAR ASSOCIATION
A Branch of the
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L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

3rd Annual "Bread and Butter" Issues in Family Law

ISBN: 978-1-77060-146-8

Friday, September 21, 2012

Ontario Bar Association
Continuing Professional Development

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Date & Location: Friday, September 21, 2012| 9:00 am to 12:30 pm
Twenty Toronto Street Conferences and Events (OBA Conference Centre)
20 Toronto Street, 2nd Floor, Toronto

Program Chairs: **Alex Finlayson,** Barrister and Solicitor
James Herbert, Chappell Partners LLP

Agenda

9:00 am	Introductory Remarks
9:10 am	**Pensions** **Peter Martin,** Golden Actuarial Services - Mississauga
9:30 am	**Marriage Contracts** **Stephen Grant,** Grant & Sadvari
10:00 am	**Striking Pleadings** **Lorna Yates,** Ballantyne Yates LLP
10:30 am	Break
10:45 am	**Creative Ways of Settling Equalization or Support Obligations** **William Abbott,** MacDonald & Partners
11:15 am	**Lump Sum Spousal Support Awards** **Erin Reid,** McKenzie Lake Lawyers LLP - London
11:45 pm	**Custody / Access Assessments** **Nicole Tellier,** Barrister and Solicitor
12:15 pm	Questions and Closing Remarks
12:30 pm	Program Concludes

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CPD

3.5 Substantive Hours
0 Professionalism Hours

Note: New members may apply any program that contains a minimum of **0.5 Professionalism Hours** toward the annual CPD requirement.

Program Participants

Alex Finlayson (Program Chair)

Alex Finlayson graduated in the top of his class from Osgoode Hall Law School in 2001 and was called to the Ontario Bar in 2002. His practice is restricted to family law and he appears in all levels of the Ontario Courts. He has several reported cases to his credit. Mr. Finlayson is actively involved in the profession. He is a member of the Ontario Bar Association, Family Law Section Executive, the Ontario Bar Association, Family Law Section Executive CLE Subcommittee, and the 311 Jarvis "Open Bar" Planning Committee at the Ontario Court of Justice at 311 Jarvis. His work in these organizations is focused on continuing legal education. He is also a member of the Advocates' Society. He is frequently invited to speak at or author papers for continuing legal education events.

James Herbert (Program Chair)

Originally from Alberta, James has lived in Toronto for nearly twenty-five years. He earned his Bachelor of Arts degree from the University of Alberta in 1985, followed by a Master of Arts degree at the University of Toronto in 1986, and his law degree from Osgoode Hall Law School in 1990. James was called to the bar in 1992. He has worked his entire career at Chappell Partners LLP, practicing family law and civil litigation. He is a partner. In his twenty-year career, James has accumulated a great deal of experience, appearing in court in a wide variety of cases. James' approach to litigation is practical. He understands the costs and stress of litigation. He resolves his clients' cases fairly, and in a cost efficient manner. In any litigation, a cost / benefit analysis should be done before taking any significant step. James is a supporter of alternatives to the traditional litigation route. In particular, James has had success with "Mediation / Arbitration" which is an increasingly popular way of resolving family law cases. James has significant experience outside the area of family law. He regularly works in the area of defamation, wrongful dismissal, collections, and commercial litigation. James is a member of the Ontario Bar Association. James speaks at continuing education programs offered by the Ontario Bar Association and the Law Society of Upper Canada. James was the co-chair of the "Family Law Institute," a significant continuing legal education program to be offer by the OBA in February 2009. James is the co-chair of the annual "Bread and Butter Issues in Family Law" put on by the OBA. James is the editor of O'Brien's Encyclopedia of Forms – Family Law.

William Abbott

Will completed his undergraduate degree at Bishop's University in Lennoxville Quebec in 1988, graduated from the University of Windsor Law School in 1993 and was called to the Ontario Bar in 1995. Will is a partner at MacDonald & Partners LLP having and has practised exclusively in family law since joining the firm in 2002. Will has appeared at all levels of court in Ontario and has a large mediation/arbitration practice. Will has spoken to different professional organizations on various aspects of family law and is a contributing author to the many books written by MacDonald & Partners LLP on various family law subjects.

Stephan Grant

Stephen Grant is a principal in Grant & Sadvari, www.grantsadvari.com. He is a Fellow of the American College of Trial Lawyers and International Academy of Matrimonial Lawyers, the editor of the Advocates' Journal and was awarded a Law Society Medal in 2006.

Peter Martin

Peter Martin established Golden Actuarial Services in 2002 specializing in the valuation of pensions on marriage breakdown after a 20 year career in life insurance and pensions. Golden Actuarial now provides valuation of personal injury damages in association with Rich Rotstein, as well as valuation of life insurance policies, stock options, and post-employment benefits. Peter is a Fellow of the Canadian Institute of Actuaries and the Society of Actuaries. He is a member of the Actuarial Evidence Committee of the Canadian Institute of Actuaries, and has been a past speaker at CIA events as well as an organizer of the CIA's annual expert evidence conference. He has provided expert evidence in court in Ontario.

Erin Reid

Since her call to the Bar in 2004 Erin has practiced with McKenzie Lake Lawyers LLP in London, Ontario. She made partner in 2011. Erin limits her practice to family law. Her litigation experience includes acting as appellant's counsel in *Fisher* v. *Fisher* and *Davis* v. *Crawford*, both of which have impacted the law of spousal support in Ontario. Erin welcomed her second child in February of this year, keeping her busy in addition to the practice of law.

Nicole Tellier

Nicole graduated from Osgoode Hall Law School in 1986 and was called to the Bar in 1988. Her practice is restricted to family law. She appears in all levels of court, with four cases in the Supreme Court of Canada. She has extensive experience in resolving and litigating financial matters and difficult parenting cases. She also provides mediation services. She is a former Director of the Advocates' Society and former Executive member of the Ontario Bar Association and continues to be actively involved in those organizations. She has been engaged in law reform by testifying as an expert before numerous federal and provincial justice committees on criminal, constitutional and family law issues. She contributes widely to continuing legal education programs, including judicial education, in Ontario and elsewhere. In 2010, she received the Ontario Bar Association Award for Excellence in Family Law.

Lorna Yates

Partner at Ballantyne Yates LLP. Lorna's client service focussed approach, along with her energetic advocacy on behalf of her clients, is the foundation for her successful practice. Lorna has experience in all areas of family law, including negotiation of complex marriage contracts, separation agreements and parenting plans. Lorna has appeared before the Ontario Court of Justice, Ontario Superior Court of Justice and the Divisional Court of the Superior Court of Justice and the Ontario Court of Appeal. Lorna is currently the Chair of the Ontario Bar Association, Family Law Executive and sits on the Executive of the Canadian Bar Association, Family Law Executive. She is also a member of the Advocates Society, the Association of Family and Conciliation Courts, the Family Lawyer's Association, and has participated in the Child Advocacy Training Project through Pro Bono Law Ontario. Lorna has contributed to Bar Admission Course materials, the LSUC's *Separation Agreement Annotated*, "Money and Family Law" and various papers for CLE programs through the Ontario Bar Association and the Law Society of Upper Canada. She has both spoken at or co-chaired various Continuing Legal Education programs including the "6 Minute Lawyer" program and co-chairing the OBA's Annual Institute (Family Law Program). Lorna has also contributed articles for "*The Lawyer's Weekly*" and "*The Law Times*". Lorna enjoys her work as an Instructor for the Family Information Sessions in Toronto, and she is a Panel Lawyer for the Personal Rights Panel for the Office of the Children's Lawyer. Recently, Lorna has been appointed to both the Bench and Bar Committee for the Superior Court in Toronto and the Law Society of Upper Canada's Barristers Competency Review Group for the Licensing Process. Lorna is very proud of her past work at Gowling Lafleur Henderson LLP (where she also articled in the Family Law Group), Goldhart & Associates and Wilson Christen LLP. Lorna was called to the bar in February, 2002, after obtaining her LL.B. from Queen's University and B.A. from McGill University. Lorna has also been certified as a Collaborative Professional.

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To report your attendance for **CPD hours**, go to the Law Society online Member Portal at **https://portal.lsuc.on.ca**.

Here is how to report your attendance for credit:

1. Sign in on the member portal at **https://portal.lsuc.on.ca** (you will need to have registered for the portal first).
2. Select CPD tab on right hand side of the top tool bar.
3. Select **Update My CPD Program** on left hand bar.
4. Purely substantive programs are reported differently than those that contain professionalism:
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        - ✓ Click Search;
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        - ✓ Choose program; and
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    b. If the program contains no professionalism content and you are claiming credit toward your 9 hours of non-accredited CPD select: **Substantive Program/Content**
        - ✓ Key in the details of the substantive programs regardless of provider; and
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For more information about the Law Society of Upper Canada please contact the Resource Centre at **416.947.3315** or **1.800.668.7380 ext. 3315**.

For a full listing of the CPD Hours for OBA Professional Development please go to: oba.org/cpdhours

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0 Professionalism Hours

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See a list of approved programs at www.lawpro.ca/RMcredit

Whom do I contact for more information?

Contact practicePRO by e-mail: practicepro@lawpro.ca or call 416-598-5899 or 1-800-410-1013.

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Bill 133 and Its Pitfalls

Peter Martin
Golden Actuarial Services

Friday, September 21, 2012

Ontario Bar Association
Continuing Professional Development

Bill 133 AND ITS PITFALLS

Peter Martin, Fellow, Canadian Institute of Actuaries

Bill 133 in a Nutshell

Excellent discussions of Bill 133 exist. Some are listed in the resources section at the end of this paper. In a nutshell the changes brought by Bill 133 are as follows.

1. All provincially registered pension plan are now required to provide a transfer of up to one half of the Family Law Value, ("FLV"), to a non-member spouse's locked in retirement savings vehicle. Previously lump sum transfers were available only from federal agency plans or from federally registered plans.

2. Provincially registered pension plans, not actuaries, will provide the Family Law Value. Actuaries will still provide the values, (now the FLV), for plans not registered provincially.

3. All pensions will now be valued using a method set by regulations to produce a single number rather than a range of numbers.

Bill 133 provides almost the same settlement options in provincially registered plans as what have been available in federal agency and federally registered plans. The single value, the FLV, of Bill 133 is calculated using prescribed methods, these applying to all pensions, whether federal agency, federally registered, provincially registered, or unregistered plans. This is because provinces have jurisdiction over property and can specify the value of a pension on marriage breakdown. However, the province does not have jurisdiction over federal pension plans and cannot compel them to calculate and provide the since Bill 133 FLV. Note the following definitions:

Definitions

PRELIMINARY VALUE: The total value, (before tax), of the pension including both any pre-marital portion as well as any marital portion.

FAMILY LAW VALUE: The value, (before tax), of the pension excluding any pre-marital portion and including only any marital portion. The Family Law Value, ("FLV"), is also termed the Imputed Value.

Note that in this paper "member" should be read to include both active as well as former members. "spouse" should be read to be the spouse of a member, former member, or pensioner. "Tax rate" should be read to be the estimated post-retirement rate of income tax, either average or marginal.

The Four Regulatory Regimes

Federal agency plans are plans of the federal government or its arms such as the RCMP and the Armed Forces. They are typically established under a separate act of the Parliament pertaining only to them. Federally registered plans are those established under the umbrella federal pension legislation, the Pensions Benefits Standards Act, ("PBSA"). They are in the telecommunications industry, (Bell, Teleglobe Media), the banks, and the railways, (CN and CP), among others. Provincially regulated plans, registered under the Ontario Pensions Benefits Act, constitute approximately 80% of the total number of pension plans. Unregistered plans are not subject to any pension regulation.

Regulatory Regime	**Governing Legislation**	**Will Plan Provide FLV?**	**SETTLEMENT OPTIONS**			
			NOT IN PAY		**IN PAY**	
			Lump Sum Transfer	**At Source**	**Lump Sum Transfer**	**At Source**
1. **Federal Agency**	PBDA	No	Yes	No	No	Yes
2. **Federally Regulated**	PBSA	No	Yes	At Plan's Discretion	No	Yes
3. **Provincially Regulated**	**FLA & PBA**	**Yes**	**Yes**	**"Soon" At Plan's Discretion**	**No**	**Yes**
4. **Unregistered**	None	No	No	Perhaps	No	Yes

The legislation governing the division of pensions on marriage breakdown is the Pension Benefits Division Act, ("PBDA"), the Pension Benefits Standards Act, ("PBSA"), and the Family Law Act, ("FLA") and Pension Benefits Act, ("PBA"). Only provincially registered plans will provide the FLV. (A few very rare exceptions may exist.)

If a pension has not commenced, then lump sum transfers are available as a mechanism of settlement in all the regulatory regimes except for the unregistered. Federally registered plans may offer a division at source at their discretion if payments have not commenced. Provincially registered plans will be able, but not required, to offer the same as soon as enabling regulations are promulgated. Once a pension is in pay, the only settlement option available is a division at source.

Pitfall # 1: Retroactive Adjustment of In Pay Pensions in At Source Division Disregards Actual Sharing Leading to Double Compensation of Spouse

If a generous and fair-minded pensioner shared $50,000 of pension over 5 years between separation and settlement, upon a division at source at the end of the 5 years, the plan, under Ontario Regulation 287/11, section 39, is compelled to assume that the sharing has not occurred, and to slightly decrease what the pensioner would receive and to slightly increase what the spouse would receive after the Division At Source.

The following example assumes:

- Both pensioner and spouse separated at 60 and settled at 65
- A pension of $20,000 per year and a FLV of $285,000
- No survivor's pension (to simplify the example)
- All of the pension was accrued during marriage
- Sharing of $10,000 a year for 5 years with a present value of $45,928

PV	Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	
$45,928	$10,000	$10,000	$10,000	$10,000	$10,000	**Total: $50,000**

There are two solutions to this.

(1) Credit the pensioner with equalization amounting to the present value at separation of the shared payments, here $45,928. However, the spouse may not want to give up immediate equalization in return for slightly higher monthly payments over the remainder of their life.
(2) Reduce the percentage of the pension to be allocated to the spouse in Part D of Form 6 such that when the plan retroactively adjusts the Division At Source for "missed" payments the retroactively adjusted amount is the original one desired. This requires an actuarial calculation.

Initial Division

Division At Source With & Without $50,000 Retroactive Adjustment		
	Annual Pension	
	To Pensioner	To Spouse
Before Division	$20,000	$0
After Division But Without Retroactive Adj.	**$10,000**	**$10,000**
Retroactive Adjustment For $50,000	-$3,300	$3,300
After Division With Retroactive Adj for $50,000	**$6,700**	**$13,300**

Division after actuarial adjustment

Division At Source After Actuarial Adjustment to Initial Division		
	Annual Pension	
	To Pensioner	To Spouse
Before Division	$20,000	$0
Adj. Division But Without Retroactive Adj.	**$12,500**	**$7,500**
Retroactive Adjustment For $35,000	-$2,500	$2,500
After Division With Retroactive Adj for $35,000	**$10,000**	**$10,000**

Pitfall # 2: Unreported Benefits

Under Bill 133, only benefits paid directly from a registered pension plan are required to be reported on the official forms. Previously, actuaries would ferret out all the values related to a pension. Now, the lawyer must be alert for their presence. The categories of benefits that demand attention are Supplementary Executive Retirement Plans, ("SERPs"), and the automakers' "30-and-out" benefit, the Special Allowance, for some automakers. Sick benefit retirement gratuities may also merit consideration, whereas excess contributions and non-guaranteed inflation indexing are more questionable items for pursuit.

1. Supplementary Executive Retirement Plans

The cost of providing a defined benefit pension related to salary over approximately $125,000 is not tax deductible to the plan sponsor and the benefit, if present, is paid out of either a separate plan, often a Retirement Compensation Arrangement, ("RCA"), or perhaps just current cash flow. The SERP member will typically also be a member of the registered pension plan and it may appear that the reported Family Law Value includes all of the pension benefit. However, the value of a SERP can greatly exceed that of the registered plan. The only reliable way of knowing whether a SERP is present is to obtain a letter from the appropriate human resources official.

2. Automakers' Special Allowance

The automakers' "30-and-out" benefit is often paid not from the registered pension plan. The 30-and-out benefit for a long service employee can easily add $10,000 in equalization. Some plans may include this in the Family Law Value and some may not. The actuarial community is still in the process of discovering which automakers' pension plans include it in the reported Family Law Value and which do not. Our knowledge is currently as follows.

Included	Not Included	Unknown
Ford	Toyota	GM
		Chrysler
		Honda

A Family Law Value from Toyota will need to be supplemented by a separate valuation of the Special Allowance. In the case of GM, Chrysler, and Honda, you may wish to obtain a letter from the plan as to whether the

Special Allowance was included in the Family Law Value or to consult with an actuary to learn this.

3. Excess Contributions

Excess contributions may be present in defined benefit pension plans that require members to also pay into the plan. They are refunds of overpayments made to the plan by a member. The right to them is crystallized by events such as withdrawal from the plan, death, or retirement. They are likely to be present when a member is younger than age 40. In amount they can vary from $0 to perhaps a maximum of $20,000. However, the amount of equalization this represents is considerably less because of the weighting formula under Bill 133. In a recent case the excess contributions increased equalization by approximately $1,700.

They are reported in Appendix A, (page 7 of 15), of Form 4E, applicable to a former plan member who has terminated and will eventually receive a pension. However, they are not reported in Form 4B, applicable to plan members still actively employed.

For an active member they can be obtained by requesting their total from the plan administrator at the time that the FLV is requested, or from a recent annual statement. However, because of their relatively low impact on equalization, whether excess contributions are worth pursuing is open to question. Actuarial assistance will be required to perhaps verify their presence and translate their amount into a figure that can be used on the Net Family Property Statement.

4. Sick Benefit Retirement Gratuities

These are not pension benefits per say, but are retirement related and often overlooked. They are present typically in the public sector and where an employee has accumulated a substantial number of sick days. If an employee is younger and with a lower salary they may add approximately $2,500 in equalization. If older with a higher salary, perhaps $7,500.

5. Non-Guaranteed Inflation Indexing

This is a source of value in pension plans that was not included in the Family Law Value under Bill 133 that was formerly reported on in actuarial reports on pension value on marriage breakdown. This is partly understandable because by their very nature the indexing is not guaranteed and thus its

continuation is a matter of opinion and frequently dispute. In the pre-Bill 133 regime, their presence might typically add 10% to pension value.

Their presence is reported in Forms 4B and 4E, in Appendix D. However, because of the difficulty in agreeing on a value for them, and the relatively small size of the value, whether this is worth pursuing is again open to question. However, in time, perhaps in 10 years, as guaranteed inflation increases are dropped in the public sector, their value may become sufficiently large to be significant. An example is HOOPP where there is no guarantee of inflation indexing on pension accrued from January 1, 2006 but where they are providing inflation indexing on these accruals.

Pitfall # 3: When Equalizing With Non-Pension Assets Rather Than a Transfer, Do You Give Pre-Settlement Interest?

When equalizing with a lump sum transfer, the plans under Bill 133 will automatically give interest on the lump sum between the date of separation and the date of transfer. If equalization is being effected with non-pension assets rather than a transfer, do you provide the same interest between the date of separation and the date of transfer?

This is a legal rather than an actuarial issue. From the spouse's perspective they may be accepting considerably less when receiving non-pension assets versus a transfer. Now that a transfer is available it would be difficult to claim hardship.

Pitfall # 4: Accepting Too High An Average Tax Rate For the Plan Holder When Acting for the Spouse

Tax rates are the projected post-retirement, average, rates of income tax, taking into account the situation at separation disregarding the impact of the separation itself, that are expected to be paid between retirement and death. There is frequent confusion between tax rates when still employed and after retirement, and between average tax rates and marginal tax rates.

Average tax rates are used because of the difficulty of determining which was the first dollar received and which the last dollar received in a particular calendar year. Tax rates one sees used for RRSPs are frequently as much as 25% which are almost always too high. For example, a 45 year old would have to have about $650,000 in RRSPs to have an estimated post-retirement income tax rate of 25%. In the following example, accepting a 25% tax rate when the rate is really 15% decreases equalization owing by $10,000.

	25% Tax	**15% Tax**
FLV of DB Pension	$200,000	$200,000
Tax Rate	25%	15%
Tax	$ 50,000	$ 30,000
After Tax	$150,000	$170,000
Equalization Owing	$ 75,000	$ 85,000

Pitfall #5: When Transferring, Accepting Either Too High or Too Low a Marginal Tax Rate for The Spouse

The following table illustrates the impact of using 15% to gross up $100,000 of equalization to be effected with a transfer when the actual projected marginal post-retirement income tax rate for the spouse is 5% or 25%. 5% would be the case if the spouse were a stay at home spouse. 25% would be the case if the spouse had substantial retirement assets of their own.

In the example, if the spouse's marginal post-retirement income tax rate was actually 5%, the plan member would be overpaying by $12,300. If the spouse's marginal post-retirement income tax rate was actually 25%, then the spouse would be under compensated by $15,700.

Item	Before Or After Tax?	Based on Incorrect 15% Tax	Based on "Low" Correct Tax	Based on "High" Correct Tax
Equalization to effected by Transfer	Before Tax	$100,000	$100,000	$100,000
Spouse's Estimated **Marginal** Post-Retirement Tax Rate		15%	5%	25%
Pre-Tax Equalization Required **Grossed Up by Marginal Tax** for Transfer		$117,600	$105,300	$133,300
Excess "+", or Shortfall "-", in Transfer versus "Correct" Amt			+ $12,300	- $15,700

Tax Rates

Tax rates determined for the member and the spouse serve different purposes

(1) For the member they are average rates applied as the disposition costs of the pension.
(2) For the spouse they are marginal rates used to gross up the equalization to be effected with a transfer.
(3) In the case of an in pay pension where the spouse has the right to a survivor's pension the spouse's projected average rate of tax if the pensioner predeceases them is also required.

The following chart compares and contrasts the member's and the spouse's tax rates under (1) and (2) above.

ESTIMATED POST-RETIREMENT INCOME TAX RATES	
FOR MEMBER	**FOR SPOUSE**
For Disposition Cost of Pension	Grossing Up Pre-Tax equalization required to be effected by Transfer to obtain Transfer amount required
AVERAGE	**MARGINAL**
Project Pre-separation situation into retirement	Project at settlement situation into retirement
At Separation disregarding subsequent events	At settlement taking into account subsequent events **including the Transfer amount itself**
	Answers “Is the offered pre-tax property going to be worth the equalization owed after spouse pays tax on it in the currently foreseeable circumstances of the spouse?”

The following formulas are used to apply the rates.

ESTIMATED POST-RETIREMENT INCOME TAX RATES	
APPLICATION TO MEMBER	**APPLICATION TO SPOUSE**
FLV x (1 - Member’s Avg Tax %) = FLV after tax	(Equalization To Be Effected With Transfer) (1 - Spouse’s Marginal Tax %) = Amount to be Transferred to Effect Equalization
	Conversely, for the spouse, (Amount Transferred) x (1 – Spouse’s Marginal Tax %) = Equalization Effected

Recommended Average Tax Rates for the Member

To simplify the application of the above formulas I recommend the use of the following average tax rates for the member. While it is preferable to obtain an exact tax rate in each case, the following are based on averages from the cases in my files and are meant to be reasonable in most cases.

Pension Plan Type	**Typical Range of Tax Rate**	**RECOMMENDED AVERAGE TAX RATE FOR MEMBER**
Defined Contribution Pension Plan	5% to 15%	**10%**
Defined Benefit Pension (not Firefighters, Police, Teachers)	10% to 20%	**15%**
Defined Benefit Pension (Firefighters, Police, Teachers)		**20%**
Pensioner, in pay		**Use avg. tax paid from last filed income tax return**
Spouse's Survivor's Pen.		1. Actuarial assistance or 2. Use member's for simplicity

Do **not** accept higher rates for a member! If you encounter an excessively high rate insist on a tax rate report supporting it. Alternatively, you may refer opposing counsel to the above table on my website at www.goldenactuarial.com, or to myself personally.

Marginal Tax Rates for the Spouse

Marginal rates for the spouse can vary dramatically and there are no recommendations for them except to have them calculated. I strongly suggest that the spouse's, (and member's), tax rates be calculated for a transfer if the transfer is $100,000 or more. In the absence of a calculation, if the transfer is not large, the member's average tax rate might be used as a stand-in for the spouse's marginal rate.

Can I equalize the Pension With A transfer and Exclude It From the Net Family Property Statement Avoiding Consideration Of Taxes?

The answer to this question is yes, but there are three pitfalls.

(1) Software zeroes out negative net family property. Not including the pension may prevent the member from benefiting from deductions for debts that have been zeroed out by the software.

(2) Even if the plan member does not have negative net family property, excluding the pension may create a situation in which the spouse owes an equalization payment to the member whereas with the pension this would not be the case. The spouse may not wish to give liquid assets to the member in exchange for a non-liquid asset only accessible later.

(3) Doing so assumes that:

[Plan Member's Average Tax Rate] = [Spouse's Marginal Tax Rate]

This may not be the case. I strongly recommend having tax rates calculated if the transfer is $100,000 or more. The tax effects can easily affect the equalization by $10,000.

Resources

(1) OBA seminar of October 5, 2011: "**What You Need to Know About The New Law Of Pension Division On Marriage Breakdown**" – Highly recommended
(2) Osgoode seminar of January 18, 2012, "**Pension and Benefit Entitlements Upon Marriage Breakdown: The Legal Guide**"
(3) Golden Actuarial Services – 2 hour presentation, "**Bill 133: How Will I Cope?**"

BILL 133 and its Pitfalls!

September 21, 2012

Peter Martin
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Bill 133 In a Nutshell

1. **Provincially registered pension plans will now transfer ½ the Family Law Value** to a spouse's locked in retirement savings vehicle!
2. For provincially registered pension plans, the Plan, not actuaries, will provide the Family Law Value. Actuaries will still provide the values for plans not registered provincially.
3. All pensions will now be valued using a method set by regulation to produce only 1 value rather than a range.

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PRELIMINARY VALUE	**FAMILY LAW VALUE ("FLV")** also termed **IMPUTED VALUE**
Pre-Marital + Marital	Marital
Before Tax	

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Regulatory Regime	Governing Legislation	Will Plan Provide FLV?	SETTLEMENT OPTIONS			
			NOT IN PAY		IN PAY	
			Lump Sum Transfer	At Source	Lump Sum Transfer	At Source
1. **Federal Agency**	PBDA	No	Yes	No	No	Yes
2. **Federally Regulated**	PBSA	No	Yes	At Plan's Discretion	No	Yes
3. **Provincially Regulated**	**FLA & PBA**	**Yes** (But Not Tax)	**Yes**	**"Soon" At Plan's Discretion**	**No**	**Yes**
4. **Unregistered**	None	No	No	Perhaps	No	Perhaps

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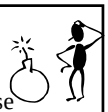
Pitfall #1: Retroactive Adjustment of In Pay Pensions in At Source Division Disregards Actual Sharing Leading to Double Compensation of Spouse



Pension Shared With Former Spouse Between Separation and Settlement

Separation	Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	*At Source Division Effected After 5 yrs*
	$10,000	$10,000	$10,000	$10,000	$10,000	**Total: $50,000**

• A generous and fair-minded pensioner has shared $50,000 of the pension over the 5 years between separation and settlement

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• In effecting settlement with a Division At Source after 5 years the plan under Ontario Regulation 287/11, section 39, is compelled to assume that the sharing has not occurred and to slightly decrease what the pensioner would receive and slightly increase what the spouse would receive after the Division At Source
• The following example assumes:
  • Both pensioner and spouse separated at 60 and settled at 65
  • A pension of $20,000 per year and a FLV of $285,000
  • No survivor's pension (for simplicity)
  • All of pension was accrued during marriage

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Division At Source With & Without $50,000 Retroactive Adjustment		
	Annual Pension	
	To Pensioner	To Spouse
Before Division	$20,000	$0
After Division But Without Retroactive Adj.	**$10,000**	**$10,000**
Retroactive Adjustment For $50,000	-$3,300	$3,300
After Division With Retroactive Adj for $50,000	**$6,700**	**$13,300**

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SOLUTIONS:

(1) Credit the pensioner with the present value of the shared payments – here $45,928 – as an equalization amount (after tax) through non-pension assets to counterbalance the double compensation – but spouse may not want to give up equalization

- Need to take care as to whether the shared payments to spouse were before or after tax – after tax if pensioner and not spouse paid the tax

Present Value at Separation	Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	At Source Division Effected After 5 yrs Total:
$45,928	$10,000	$10,000	$10,000	$10,000	$10,000	$50,000

(2) Reduce the percentage of the pension to be allocated to the spouse in Part D of Form 6 such that when the plan retroactively adjusts the division at source for "missed" payments the retroactively adjusted amount is the original one desired (Requires Actuarial Calculation – See slide 9)

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Division At Source After Actuarial Adjustment to Initial Division		
	Annual Pension	
	To Pensioner	To Spouse
Before Division	$20,000	$0
Adj. Division But Without Retroactive Adj.	**$12,500**	**$7,500**
Retroactive Adjustment For $35,000	-$2,500	$2,500
After Division With Retroactive Adj for $35,000	**$10,000**	**$10,000**

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Pitfall #2: Unreported Values

- Unreported because benefit not paid from a Registered Pension Plan. Previously independent actuaries reports would catch these
- **SERPs** (Supplementary Executive Retirement Plans)
  - •may be provided to employees earning more than $125,000
  - •can add hundreds of thousands in equalization
  - •only reliable way of detecting them is to obtain a letter from HR
- •**Automakers' Special Allowance** (30-and-out benefit)
  - •May or may not be included by plan
  - •Not Included: **Toyota, GM**; Is Included: Ford; Uncertain: Chrysler, Honda. [**Knowledge evolving – CONSULT!**]
- Excess Contributions – Either request these when requesting the FLV from the plan or seek actuarial assistance
- Sick Benefit Retirement Gratuities
  - Younger, lower salary – equalization of $2500
  - Older, higher salary – equalization of $7500

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Value Source	Present With	Size $ of Eq.	SOLUTION
1. **SERPs**	**Salary > $125,000**	BIG	Obtain Letter from HR
2. **Automakers' Special Allowance**	**Toyota**, (maybe other automakers)	**May be Large** (>$10000)	Toyota – Need to value certain GM, Chrysler, Honda – Consult actuary re presence
3. Excess Contributions	- Contributory - Age < 40	$5000	1. Request along with Form 1 2. Or Actuarial assistance
4. Sick Benefit Retirement Gratuities	- Public sector - Substantial sick days	$2500 to $7500	Obtain Letter from HR
5. Non-Guaranteed Inflation Indexing	- Need actuarial assistance	+10% Will grow	- In 10 years may be "large" (HOOPP) in public sector. Is it marital property?

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Pitfall #3: When Equalizing With Non-Pension Assets Rather than a Transfer, Do You Give Pre-Settlement Interest?

- When equalizing with a lump sum transfer, the plans under Bill 133 will automatically give interest on the lump sum between the date of separation and the date of transfer
- If equalization is being effected with non-pension assets rather than a transfer, do you provide the same interest between the date of separation and the date of transfer?
- This is a legal issue for lawyers to consider rather than an actuarial issue. Would remark that:
  - From the spouse's perspective they are accepting considerably less when receiving non-pension assets versus a transfer
  - With a transfer available there can be no claim of "hardship"

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Pitfall #4: Accepting Too High An Average Tax Rate For the Plan Holder When Acting for the Spouse

- Tax rates are the projected post-retirement **average** rate of income tax expected over retirement until death
- Frequent Confusion between:
  (1) tax rates while working and projected rates after retirement
  (2) Average versus marginal tax rates
- For RRSPs currently one frequently sees 25% used which is almost always too high
  - A 45 year old needs about $650,000 in RRSPs to have an estimated post-retirement income tax rate of 25%

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• In the following example, accepting 25% when the rate is really 15% costs the spouse $10,000.

	25% Tax	**15% Tax**
FLV of DB Pension	$200,000	$200,000
Tax Rate	25%	15%
Tax	$ 50,000	$ 30,000
After Tax	$150,000	$170,000
Equalization Owing	$ 75,000	$ 85,000

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Pitfall #5: When Transferring, Accepting Either a Too High or a Too Low Marginal Tax Rate For the Spouse

• In the example in slide 16 pre-tax equalization of $100,000 is to be effected with a Transfer.
• The gross-up to the pre-tax amount to be transferred is done using an incorrect estimated marginal post-retirement income tax rate for the spouse of 15%
• However, if the actual estimated marginal post-retirement income tax rate for the spouse was 5%, the plan **member** would be **overpaying by $12,300** – e.g. a stay-at-home spouse
• If the actual estimated marginal post-retirement income tax rate for the spouse was 25%, the **spouse** would be **undercompensated** by **$15,700 –** e.g. a spouse with substantial ret. income of their own

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Item	Before Or After Tax?	Based on Incorrect 15% Tax	Based on "Low" Correct Tax	Based on "High" Correct Tax
Equalization to effected by Transfer	Before Tax	$100,000	$100,000	$100,000
Spouse's Estimated **Marginal** Post-Retirement Tax Rate		15%	5%	25%
Pre-Tax Equalization Required **Grossed Up by Marginal Tax** for Transfer		$117,600	$105,300	$133,300
Excess "+", or Shortfall "-", in Transfer versus "Correct" Amt			+ $12,300	- $15,700

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TAX RATES

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ESTIMATED POST-RETIREMENT INCOME TAX RATES	
FOR MEMBER	**FOR SPOUSE**
For Disposition Cost of Pension	Grossing Up Pre-Tax equalization required to be effected by Transfer to obtain Transfer amount required
AVERAGE	**MARGINAL**
Project pre-Separation situation into retirement	Project at Settlement situation into retirement
At Separation disregarding subsequent events	At Settlement taking into account subsequent events **including the Transfer amount itself**
	Answers "Is the offered pre-tax property going to be worth the equalization owed after spouse pays tax on it in the currently foreseeable circumstances of the spouse?"

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ESTIMATED POST-RETIREMENT INCOME TAX RATES	
APPLICATION TO MEMBER	**APPLICATION TO SPOUSE**
FLV x (1 - Member's Avg Tax %) = FLV after tax	(Equalization To Be Effected With Transfer) (1 - Spouse's Marginal Tax %) = Amount to be Transferred to Effect Equalization
	Conversely, for the spouse, (Amount Transferred) x (1 – Spouse's Marginal Tax %) = Equalization Effected

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Pension Plan Type	**Typical Range of Tax Rate**	**RECOMMENDED AVERAGE TAX RATE FOR MEMBER**
Defined Contribution Pension Plan	5% to 15%	**10%**
Defined Benefit Pension (not Firefighters, Police, Teachers)	10% to 20%	**15%**
Defined Benefit Pension (Firefighters, Police, Teachers)		**20%**
Pensioner, in pay		**Use avg. tax paid from last filed income tax return**
Spouse's Survivor's Pen.		1. Actuarial assistance or 2. Use member's for simplicity

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- The ideal is to obtain a tax calculation for the member's estimated post-retirement average tax rate in each case
- Failing this, I suggest using my recommended rates for the member's from the previous slide
  - Do **not** accept a higher tax rate for the member without a tax rate report!
- The rates for the spouse can vary dramatically and there are no recommendations except to have a tax rate calculated
  - **Strongly suggest that the spouse's (and member's) tax rates be calculated for a transfer if the transfer is $100,000 or more**
  - In the absence of a calculation, if the transfer is not large, might use member's average tax rate as a stand-in

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Can I Equalize the Pension With a Transfer and Exclude It From the Net Family Property Statement Avoiding Consideration of Taxes?

YES! – BUT THERE ARE PITFALLS

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(1) Software zeroes out negative net family property.
- **Not including the pension may prevent the member from benefiting from deductions for debts that have been zeroed out by the software**

(2) Even if the plan member does not have negative net family property, excluding the pension may create a situation in which the **spouse owes an equalization payment to the member whereas with the pension this would not be the case**
- The spouse may not wish to give liquid assets to the member in exchange for a non-liquid asset only accessable later

(3) Doing this assumes that:
[Plan Member's Avg Tax Rate] = [Spouse's Marginal Tax Rate]
This may not be the case
- Strongly recommend having tax rates calculated if the transfer is $100,000 – can easily affect equalization by $10,000

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- **SUGGEST: If wish to avoid exact tax calculations:**
  a. Put pension on Net Family Property Statement using the recommended average tax rates given on slide #20
  b. If transferring, gross up equalization owing using the member's average tax rate used in a.
  - This avoids pitfalls #1 and #2 on slide #23 (but not pitfall # 3)

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RESOURCES

(1) OBA seminar of October 5, 2011: "**What You Need to Know About The New Law Of Pension Division On Marriage Breakdown**"
(2) Osgoode seminar of January 18, 2012, "**Pension and Benefit Entitlements Upon Marriage Breakdown: The Legal Guide**"
(3) Golden Actuarial
    a. www.goldenactuarial.com
    b. 2 Hour Presentation - **"Bill 133: How Will I Cope?"**

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3rd Annual "Bread and Butter" Issues in Family Law

Is An Order a Suggestion?: Contempt / Striking Pleadings as Remedies in Family Law and a Post-*Purcaru* Update

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Ballantyne Yates LLP
and
Simon W. Wozny
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Friday, September 21, 2012

Ontario Bar Association
Continuing Professional Development

Is An Order a Suggestion?: Contempt / Striking Pleadings as Remedies in Family Law and a Post-*Purcaru* Update

Lorna M. Yates, Ballantyne Yates LLP and
Simon W. Wozny, Ballantyne Yates LLP[1]

Introduction

In the words of Justice Quinn in *Gordon v. Starr*[2], "Why should any litigant be spared from obeying a court order?".

But ensuring compliance is easier said than done. Often there is much work put into securing an Order which gives the parties and the litigation in general some direction and focus but without teeth, the Order can be meaningless.

The purpose of this paper is to focus on the means of putting teeth into Court Orders, and to provide an overview of the current state of the law as it relates to securing findings of contempt and striking pleadings in family law matters.

A contempt order is meant to force compliance with substantive and procedural orders, and to protect the administration of justice. Given the nature of family law litigation, there is often a compelling and urgent need to force compliance with court orders. However, this goal must be balanced against the restraint that courts should exercise given the severe sanctions consequent to contempt orders. As stated by Justice Veit in *Salloum v. Salloum*[3],

> "...given the twin objectives of protecting both the best interests of the children and the administration of justice... [c]hildren are better off if their parents are not in jail or paying fines."

It is important to keep in mind that contempt orders are not meant to punish parties who are not complying with substantive and/or procedural orders. The overarching goal is to force

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[2] [2007] O.J. No. 3264 (S.C.J.).
[3] 1994 CarswellAlta 577 (Alta Q.B.), at para. 20.

compliance with previous court orders. In *Harry v. Singh*[4], a mother's contempt motion against the grandparents was heard after the grandparents had stopped denying her access. It was the mother's position that the contempt motion should still be heard because "she felt they had to suffer the consequences of [their past] actions". Justice J. W. Bovard held that this did not justify pursuing the motion because "the primary object of contempt in family law is not to punish the parties, but rather, to force them to comply with court orders".

In this paper we address some of the practical issues arising out of the application of contempt orders, including the applicable sections of the *Family Law Rules* and the case law relevant to these issues. We have also summarized recent cases where the court has considered contempt motions in Appendix "A" to this paper. Finally, we discuss under what circumstances the court will strike pleadings, current trends in the case law dealing with striking pleadings, and related practical issues.

<u>What types of orders can be enforced through contempt?</u>

Any court order other than a payment order can be enforced by a contempt order. Subrule 31(1) of the *Family Law Rules* provides:

> *When Contempt Motion Available*
>
> 31. (1) An order, other than a payment order, may be enforced by a contempt motion made in the case in which the order was made, even if another penalty is available.

Support orders are therefore not enforceable by contempt orders; this issue has been settled by the Ontario Court of Appeal in *Forrest v. Lacroix Estate.*[5]

However, failure to pay money into court (*Coletta v. Coletta*[6]) and breach of an order to post a letter of credit (*Dickie v. Dickie*[7]) are both matters that are enforceable by contempt orders.

<u>What are the procedural requirements that a lawyer seeking a finding of contempt must follow?</u>

Subrules 31(2) and 31(3) of the *Family Law Rules* address service of the notice of contempt

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[4] 2007 CarswellOnt 4627 (Ont. C.J.), at para. 20.
[5] 2000 CarswellOnt 1887 (Ont. C.A.).
[6] 2003 CarswellOnt 55 (Ont. S.C.J.)
[7] 2006 CarswellOnt 118 (Ont. C.A.)

motion and its supporting affidavit:

> *Notice of Contempt Motion*
>
> 31. (2) The notice of contempt motion (Form 31) shall be served together with a supporting affidavit, by special service as provided in clause 6(3)(a), unless the court orders otherwise.
>
> *Affidavit for Contempt Motion*
>
> 31. (3) The supporting affidavit may contain statements of information that the person signing the affidavit learned from someone else, but only if the requirements of subrule 14(19) are satisfied.

Subrule 14(19) addresses additional requirements that hearsay statements set out in an affidavit in support of a contempt motion must meet::

> *Affidavit Based on Other Information*
>
> 14. (19) The affidavit may also contain information that the person learned from someone else, but only if,
>
> > (a) the source of the information is identified by name and the affidavit states that the person signing it believes the information is true; and
> >
> > (b) in addition, if the motion is a contempt motion under rule 31, the information is not likely to be disputed.

1. Particulars and Grounds of the Alleged Breach Should Be on the Notice of Contempt Motion Form

The factual basis for the breach of the order should be alleged on the notice of contempt motion form itself and great care should be taken to ensure that it contains all the relevant details of the alleged breach. In *Ayotte v. Bishop*[8], a father brought a motion for contempt on

[8] 1996 CarswellOnt 3563 (Ont. Gen. Div.), at paras. 9, 11

the basis that his ex-spouse was in breach of an access order. In deciding that the proceeding must fail on "narrow technical grounds", Justice Aston stated:

> [...] The two notices of motion in the *Dare Foods* case were found to be deficient because, in the notices themselves, there was no particular allegation as to the date or place of the alleged breach of the court's prior order... a charge must be specific and "concrete facts of a nature to identify the particular act which is charged" are necessary ingredients of the grounds upon which the motion is based. [...]
>
> [...]
>
> I do the same in this case.

Note that Justice Aston found that it made no difference that the particulars of the breach could have been made out by reading the affidavits filed in support of the notice of motion. The particular details of the alleged breach must be complete and must appear on the notice of contempt motion form.

2. Wilful Conduct Must be Alleged

The notice of contempt motion must allege wilful conduct on the part of the party alleged to have committed the breach. In *Sharpley v. Sharpley*,[9] Justice Maresca considered the definition of 'wilful':The moving party need not show intention on the part of the alleged contemnor to disobey or flout the order. The term "wilful" is meant to exclude only unintentional or accidental acts.The conduct must be intentional, but need not necessarily be motivated by an improper purpose. In that case, the father was found to have wilfully breached a previous order regarding financial disclosure. The father had at least some of the documents in his possession but had failed to produce them repeatedly without giving any reasonable explanation.

3. Proof of the Existence of a Previous Order

Proof of the existence of a previous order is absolutely essential to obtain a contempt order. Subrule 31(1) of the *Family Law Rules* (see above) addresses when a contempt motion is available and specifically requires a previous order to be enforced by the contempt motion. See,

[9] 2005 CarswellOnt 7763 (Ont. C.J.), at paras. 8, 10.

for example, *Children's Aid Society of Ottawa v. S. (D.)*[10], where a contempt motion was dismissed because the supervision order in question had expired.

4. Proof of Prior Service

When seeking a contempt order, it is preferable to have clear proof of service of the order alleged to have been breached and of the contempt motion. Traditionally, courts have rigidly held that proof of service is required: for example, see *Vargas v. Vargas.*[11]

Some recent cases have waived this requirement where the court found that it was abundantly clear that the alleged contemnor knew of the order. In *Dickie v. Dickie*,[12] Justice Laskin, in his dissent for the Ontario Court of Appeal (the Supreme Court of Canada allowed an appeal, being "in substantial agreement with the reasons of Laskin J.A."[13]), overlooked the fact that the respondent was not personally served where it was clear that the appellant was aware of the contempt motion. Justice Laskin writes (at para. 121):

> [The appellant] was served with notice of the return of the of the motion by fax and courier. It might have been better had he been personally served. However, [the lower court] addressed the question of service, and found that [the appellant] was "well aware of the existence of this motion and its present return date, the nature of the relief sought, and the evidentiary foundation upon which the motion is made." The record amply supports [this] finding.

5. Procedural Fairness

The respondent to a contempt motion is entitled to strict procedural fairness because of the quasi-criminal consequences of a contempt order. This has a number of procedural implications for contempt proceedings, including:

- The finding against the respondent must be proven beyond a reasonable doubt: *Pierre v. Roseau River Tribal Council;*[14]
- The respondent is not compellable to testify: *Videotron Ltee c. Industries Microlec produits electroniques inc.*;[15]

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[10] (2000), 15 O.F.L.R. 108 (Ont. S.C.J.).
[11] (1980) O.J. No. 2166 (Ont. U.F.C.)
[12] *Supra* Note 7.
[13] 2007 CarswellOnt 606 (S.C.C.).
[14] 1993 CarswellNat 231, 1993 CarswellNat 231F (Fed. T.D.).
[15] 1992 CarswellQue 125 (S.C.C.).

- The respondent has the right to demand a trial of the issue with a reasonable time to prepare a defence and call witnesses: *R. v. B.E.S.T. Plating Shoppe Ltd.*;[16] and
- Contempt hearings should be kept separate and apart from other civil issues between the parties: *Gribben v. Gribben*.[17]

A recent Ontario Court of Appeal decision, *Dickie v. Dickie*,[18] provides an up-to-date summary of the procedural rights to be afforded to the respondent in contempt proceedings. In reasons subsequently accepted on appeal by the Supreme Court of Canada,[19] Laskin J.A. for the Ontario Court of Appeal enumerated the content of an alleged contemnor's right to procedural fairness as follows (at para. 119):

> [...] Contempt proceedings, even for breach of a civil order, are quasi-criminal. Thus, [the respondent] had the right to be served with the notice of motion particularizing the allegations of contempt, the right to a hearing, the right to be presumed innocent until proven guilty beyond a reasonable doubt, and the right to make full answer and defence, including the right to counsel, the right to cross-examine witnesses against him, and the right to call evidence.

<u>What is the legal test for the finding of contempt? What is the standard of proof?</u>

1. The Three-Pronged Test

In 2006, Justice Blair for the Ontario Court of Appeal set out a three-pronged test for a finding of contempt in *G. (N.) c. Services aux enfants & adultes de Prescott-Russell*:[20]

- First, the order that was breached must clearly state what should and should not be done;
- Second, the party that disobeyed the order must have done so deliberately and wilfully; and
- Third, the evidence must prove contempt beyond a reasonable doubt.

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[16] 1987 CarswellOnt 441 (Ont. C.A.).
[17] 1972 CarswellBC 41 (B.C. S.C.).
[18] Supra Note 7.
[19] Supra Note 13.
[20] 2006 CarswellOnt 3772 (Ont. C.A.).

Justice Armstrong for the Ontario Court of Appeal, referring to *G. (N.) c. Services aux enfants & adultes de Prescott-Russell,* considered this test in *Hobbs v. Hobbs*:[21]

The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order.

2. The Order Must State Clearly and Unequivocally What Should and Should Not Be Done

The court should not attempt to look past the wording of an order alleged to have been breached to determine its intent. This is because an alleged contemnor is entitled to the benefit of the reasonable interpretation of the order that is most favourable to them. Justice Frankel, for the B.C. Court of Appeal, reviews these principles in *Gurtins v. Panton-Goyert*:[22]

> ...[I]n a contempt matter, an order alleged to have been breached must be precise and unambiguous in its direction, and the alleged contemnor is entitled to the most favourable interpretation of it [...] It is apparent from the chambers judge's reasons that, in interpreting the orders, she had regard to the transcripts of various court appearances, and to the reasons given by de Walle P.C.J. and Goepel J. for making their respective orders.
>
> [...] As stated in *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 2005) (at para. 12-55), "[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation". [...]

In that case, the contempt motion was dismissed where the order alleged to have been breached clearly intended the parties to return the child to Kitimat, B.C. but nothing on the face of the order obligated the parties to do so (at paras. 12, 17).

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[21] 2008 CarswellOnt 5037 (Ont. C.A.), at para. 26.
[22] 2008 CarswellBC 908 (B.C. C.A.), at paras. 14, 15.

3. "Wilful" Means Deliberate and Not Accidental or Unintentional

The requisite intention or *mens rea* required for a finding of contempt sets a low threshold. A party may take steps towards complying with a prior order but still be held in contempt if they reasonably could have fulfilled their obligations. However, efforts taken towards complying with the prior order may be considered as mitigating factors when the court decides the penalty to be imposed.

In *Garley v. Gabai-Maiato*,[23] Justice Wolder reviewed the case law and concluded:

> The intention or the mental state of the person charged with civil contempt of court, that is the *mens rea* of the offence, does not require that the defendant intended to disobey or flout an order of the court. The offence consists of the intentional doing of an action that is, in fact, prohibited by the order. The absence of contumacious contempt is a mitigating but not an exculpatory circumstance. Wilfulness is required in the sense that the conduct be deliberate and not accidental or unintentional. [...] The wilful intentional act here is the refusal to do what was required by the court order to be done.

In that case, the respondent had been ordered to take the necessary steps to apply for a passport for his child. While the court recognized that the respondent had taken many of the necessary steps, and had encountered bureaucratic delays and obstacles with the Milton family court office, he was nevertheless held in contempt for not taking all of the reasonable steps available to him (at paras. 12 and 13).

There is a line of cases that suggests that finding that an alleged contemnor wilfully and deliberately breached a court order requires a consideration of whether the breach amounts to a substantial affront to justice. In *Fisher v. Fisher*[24], a mother and father with a long history of high-conflict litigation had been ordered to abide by a "code of conduct" in their dealings with each other. The father made two slight breaches of this code of conduct (unspecified in the case) and when the father gave an explanation for his breaches the court held that it was not satisfied beyond a reasonable doubt that he had acted "wilfully and deliberately". While

[23] 2006 CarswellOnt 574 (Ont. C.J.), at para. 16.
[24] 2003 CarswellOnt 1170 (Ont. S.C.J.), at paras. 11, 15.

considering whether a contempt order was appropriate in this situation, Justice Chadwick stated (at para. 11):

> Contempt of Court is the big stick of civil litigation. It should be used sparingly and only in the most clear cut of cases. There are other procedures available to enforce orders; other than a contempt motion. To use contempt motions to enforce minor but annoying breaches of a Code of Conduct, takes away and waters-down the effectiveness of the contempt procedure. Contempt should be reserved for those serious breaches, which justify serious consequences.

In another access case, *Reithofer v. Dingley*,[25] the court held that contempt orders should be made only where behaviour undermining an access order was sufficiently deliberate and intentional. In this case, the court found that the mother was discouraging her children from having a relationship with their father in a variety of ways. Despite this finding and without explanation, the court was somehow not satisfied "beyond a reasonable doubt that [the mother] wilfully disobeyed any of the existing court orders with respect to [the father's] access". The court distinguishes this case from prior cases where parties were found in contempt for refusing access in a way that was "obvious, deliberate and wilful."

4. Defences

➔ Refusing Access Out of a Legitimate Concern for Children

In *Johannesson v. Johannesson*,[26] the court acknowledged (at para. 28) that "a refusal to permit access out of a legitimate concern for the children, rather than a desire to frustrate access or deny contact, does not amount to contempt." In that case, the mother unilaterally decided to supervise access out of a baseless fear that the father would abduct their children. The contempt motion was dismissed on the basis that the order was not worded clearly enough to discern whether the mother had in fact breached it.

[25] 2000 CarswellOnt 1087 (Ont. S.C.J.), at paras. 51, 54.
[26] 2003 CarswellOnt 2433 (Ont. S.C.J.).

➔ Justifiable Belief That the Breach is in the Best Interests of Children

Generally, a justifiable belief that disobeying a court order is in a child's best interests is no defence to contempt: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell*.[27] The appropriate course of action is to move to vary the order.

This defence has frequently been unsuccessfully relied on in access cases. In *R. (S.) v. R. (M.)*,[28] a child would violently protest any attempt at access by the access parent. Instead of finding that the parent with primary care had a justifiable belief that it was in the best interests of the child to refuse access, the court found that the parent rewarded the child's protests and that it was ultimately in the best interests of the child that access occur. Justice Wein made a compelling argument regarding why this defence should have limited application in family cases (at para. 234):

> In the family law environment, with its undertow of feelings, it is too easy for one party to believe that he or she knows right, even after a matter has been determined by the court, and to decide then to ignore that order...

In another access case, *Fluet v. Ramage*,[29] a child would tell his mother that he did not want to see his father. The court accepted that the child did not want to return to his see his father, but nevertheless held that the mother's reliance on her son's wishes was not an acceptable defence to contempt (at para. 22):

> To be effective, the administration of justice requires compliance with court orders. Like this case, access seems to be the source of endless conflict in domestic cases and Ms. Charlene Judy Ramage needs to understand that breach of a court order is serious. [The order] is presumed to advance the best interests of the child and, until it is varied or terminated by a subsequent order, it must be respected and exercised according to its terms.

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[27] *Supra*, Note 19.
[28] 2002 CarswellOnt 1423 (Ont. S.C.J.).
[29] 2006 CarswellOnt 6058 (Ont. C.J.), at paras. 20, 22.

➔ Inability to Comply With a Court Order

Inability to comply with a court order, however, may be an acceptable defence. In *Taylor v. Taylor*,[30] the alleged contemnor had been ordered to file a letter of credit as security. The bank refused him and the court accepted that given his credit history, it was unlikely that any financial institution would provide him with a letter of credit.

Once the court has found contempt, what are its choices in terms of disposition?

1. Legislation

Subrules 31(5) and 31(6) of the *Family Law Rules* list the orders that are available to the court should a person be found in contempt of the court:

> *Contempt Orders*
>
> 31. (5) If the court finds a person in contempt of the court, it may order that the person,
>
> (a) be imprisoned for any period and on any conditions that are just;
> (b) pay a fine in any amount that is appropriate;
> (c) pay an amount to a party as a penalty;
> (d) do anything else that the court decides is appropriate;
> (e) not do what the court forbids;
> (f) pay costs in an amount decided by the court; and
> (g) obey any other order.
>
> *Writ of Temporary Seizure*
>
> 31. (6) The court may also give permission to issue a writ of temporary seizure (Form 28C) against the person's property.

Note that the list of available orders specified under Rule 31 is not exhaustive; subrule 31(5)(d) allows the court to order "anything else that the court decides is appropriate." This is significantly broader than the analogous Rule 60.11 of the *Rules of Civil Procedure*, which lists only the specific contempt orders which are available to the court.

There are statutory limits on the contempt orders that can be made by the court, as set out in subrule 31(7):

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[30] 2005 CarswellOnt 5264 (Ont. S.C.J.).

Limited Imprisonment or Fine

31. (7) In a contempt order under one of the following provisions, the period of imprisonment and the amount of a fine may not be greater than the relevant Act allows:

1. Section 38 of the *Children's Law Reform Act*.
2. Section 49 of the *Family Law Act*.
3. Section 53 of the *Family Responsibility and Support Arrears Enforcement Act*, 1996.

Finally, contempt orders for imprisonment or for payment of fines can be suspended upon the fulfillment of conditions imposed by the court. This is consistent with the purpose of contempt orders, which is to compel compliance rather than to punish the contemnor.

Conditional Imprisonment or Fine

31. (8) A contempt order for imprisonment or for the payment of a fine may be suspended on appropriate conditions.

2. Considerations in Determining an Appropriate Disposition

In *Geremia v. Harb*,[31] Justice Quinn enumerates a helpful list of considerations that should be part of determining a disposition for contempt orders (at para. 13):

> In determining an appropriate sentence in this case, my considerations have included the following:
>
> (a) available sentences;
>
> (b) conditional sentences;
>
> (c) proportionality of the sentence to the wrongdoing;
>
> (d) must the sentence correlate to the contempt?
>
> (e) similarity of sentences in like circumstances;
>
> (f) aggravating factors;
>
> (g) mitigating factors;
>
> (h) deterrence, denunciation and integrity of the legal system;
>
> (i) appropriateness of a fine; and

[31] 2007 CarswellOnt 4956 (Ont. S.C.J.).

(j) appropriateness of incarceration.

Justice Quinn also enumerates aggravating factors (at paras. 24-29) and mitigating factors (at paras. 30-36) (paraphrased below):

Aggravating Factors

(a) Lack of Remorse
(b) Multiple Breaches
(c) Effect on Relationship Between Parent and Child
(d) General Effect on Extended Families

Mitigating Factors

(a) Remorse
(b) First-Time Offender
(c) Redeeming Post-Contempt Conduct
(d) Whether the Contemnor Faces Severe Legal Costs

In this case, the mother's genuine remorse and the fact that she was a first-time offender led the court to order a suspended sentence, to be served upon a subsequent breach of any order (at para. 41).

3. Specific Contempt Dispositions

➔ Costs

Where a contemnor has compensated for their breach and/or complied with all court orders since the breach, the court may decide not to punish the contemnor apart from ordering costs against them. This is in line with the principle behind contempt orders, given their potentially severe consequences and their view towards enforcing compliance rather than punishing contemnors. For example, see *Ralston v. Schultz,*[32] where a contemnor was in breach of an access order but subsequently allowed for make-up access and had subsequently complied with the order.

A recent case from Alberta, *C. (D.B.) v. W. (R.M.),*[33] suggests that costs-only dispositions are appropriate where the interests of the children would be compromised were the court to order

[32] 2005 CarswellOnt 630 (Ont. C.J.), at para. 13.
[33] 2005 CarswellAlta 2017 (Alta. Q.B.), at para. 30.

a more severe disposition. Justice Topolniski considers this principle before ultimately making a costs-only contempt order (at para. 30):

> Like the present case, *Van de Veen v. Van de Veen* (2001), 300 A.R. 361, 2001 ABQB 753 (Alta. Q.B.) involved parental alienation at the hands of the mother. Veit J. found the mother in contempt and ordered a sanction of costs to indemnify the father for all costs of the proceedings. She observed (as Martin J. did in this case) that normal sanctions for contempt were unsatisfactory as they would punish not only the mother but also the children. The circumstances there precluded transferring the children to the custody of their father and, although warranted, jailing the mother would harm the children and their possible eventual relationship with their father. Fining the mother would deprive the children of her financial support.

➔ Penalties

Subrule 31(5)(c) of the *Family Law Rules* (see above) allows the court to order that one party pay an amount directly to another party as a consequence of a contempt order.

Ordering a penalty achieves the objectives of contempt orders generally, with the added benefit of potentially compensating a party for having to pursue enforcement of court orders through a contempt motion. In his annotation to *Taylor v. Taylor*,[34] Philip Epstein, Q.C. considers the circumstances where it is appropriate for the court to order a penalty against a contemnor:

> [...] However, in *Taylor* the husband, who had continually flouted court orders and caused his wife untold stress in the process, was found to have done so deliberately and maliciously and to have acted for economic reasons with the intention of injuring the other spouse. That kind of conduct makes it appropriate to order the penalty paid to the other spouse since the other spouse is in fact the injured party. Ordering the contemptor to pay a fine to the court or in fact jailing the contemptor was not going to advance the wife's position and get her what she needed to get and that is compliance with the minutes of settlement. The effect of the [penalty] was two-fold: to send a clear message to the husband that this kind of conduct will not be tolerated by the courts and that there are serious financial consequences to him for failure to comply with the court order.

➔ Fines

Under subrule 31(5)(b) of the *Family Law Rules*, the court may order a contemnor to pay a fine in an amount that is appropriate given the severity of the breach. The amount of the fine may be limited by statute when ordered due to a breach of obligations or orders under the

[34] *Supra*, Note 30.

provisions enumerated in subrule 35(7); fines due to contemptuous behaviour that resists obligations or orders made under the *Family Law Act*, or respecting custody of or access to a child is limited to a maximum of $5,000. Fines due to contemptuous behaviour resisting obligations or orders made under the *Family Responsibility and Support Arrears Enforcement Act* cannot exceed $10,000.

Fines may also be suspended pending subsequent breaches, or any other appropriate conditions imposed by the court, under subrule 35(8). Finally, subrule 35(10) allows the court to order payment of the fine either in a single payment upon a date that the court chooses, or in instalments over a period of time that the court considers appropriate.

Fines are sometimes rejected as a sanction because of the harmful effects it can have on a contemnor's dependents: for example, see *Fisher v. Fisher.*[35]

➔ Imprisonment

Under subrule 31(5)(a) of the *Family Law Rules*, the court can order that a contemnor be imprisoned for any period of time and under any conditions that are just. Subrule 31(7) limits the duration of imprisonment when ordered due to a breach of obligations or orders under the provisions enumerated in subrule 35(7); imprisonment due to contemptuous behaviour that resists obligations or orders made under the *Family Law Act*, or respecting custody of or access to a child is limited to a maximum of 90 days. Imprisonment due to contemptuous behaviour resisting obligations or orders made under the *Family Responsibility and Support Arrears Enforcement Act* cannot exceed 180 days.

Imprisonment is a severe disposition for a finding of contempt, especially in family law matters, and is therefore relatively rare. It is only imposed in extreme situations, where the integrity of the administration of justice outweighs the rights of the contemnor and the interests of any dependents.

In *McMillan v. McMillan,*[36] even in the face of repeated breaches of an access order, a mother was only imprisoned for 5 days. There were virtually no mitigating factors, and the contemnor

[35] *Supra*, Note 24.
[36] 1999 CarswellOnt 1028 (Ont. Gen. Div.), at paras. 23-28.

had breached the access order several times over the last 8 years. Justice Quinn carefully considered the circumstances before ordering imprisonment:

> ...[D]espite the variety of sentences that may be imposed, I do not know what else I can do to impress upon Ms. McMillan that she must abide by court orders, other than impose a custodial sentence. Giving Mr. McMillan makeup access or awarding full indemnity for his legal expenses incurred in this matter certainly is not the answer because such "punishment" does not address the harm that has been done to the administration of justice through the flagrant conduct here (which occurred despite the warning from a judge of this court as to the likely consequences of such conduct).
>
> [...]
>
> ...[I]ncarceration would not be in the best interests of the children. I agree. But when would it *ever* be in the best interests of children to send the custodial parent to jail? To create, repair or enhance the relationship between the access parent and the children? I should think that imprisoning the custodial parent is a very high price to pay if this is the only result sought to be achieved. Of all of the sentencing factors applicable in this case, I think the most important one is the need to preserve the integrity of the administration of justice; and that, as I see it, can only be achieved through a sentence of incarceration.

➔ Suspended Dispositions

Given that the goal of contempt orders is to force compliance with court orders, suspended dispositions are often effective because they remind the contemnor of the importance of the orders and the severity of the potential consequences. Where many mitigating factors to the breach are present, suspended dispositions will often be appropriate: for example, see *Bubis v. Jones*.[37]

➔ Other Dispositions

Subrule 31(5)(d) of the *Family Law Rules* allows the court to order "anything else that the court considers appropriate." Among many innovative orders, courts have:

- Transferred custody to the access parent: *Starzycka v. Wronski*;[38]
- Ordered a parent to pay money into an RESP fund for a child: *Garley v. Gabai-Maiaoto*;[39]

[37] 2000 CarswellOnt 1243 (Ont. S.C.J.).
[38] 2005 CarswellOnt 7576 (Ont. C.J.).

- Ordered a parent to pay money into court as security against future contempt: *Korwin v. Potworowski*;[40]
- Ordered a parent to seek counselling: *Kramer v. Kramer*;[41] and
- Ordered a party's pleadings struck: for example, see *Diciaula v. Mastrogiacomo*[42] (more on this below).

In what circumstances will a court strike pleadings?

If the court determines that the big stick of contempt is neither appropriate nor viable in a matter because the contemnor has shown such blatant disregard for court orders that they are are unlikely to be forced into compliance, the Court may strike a party's pleadings., The Court has the power to make any Order that is just or appropriate where a party has wilfully failed to follow the Rules or obey the Order: Rules 1(8), 2(2)-(5), and 14(23) of the *Family Law Rules*.

The Court of Appeal has recently opined on the jurisdiction and wisdom of striking pleadings in *Purcaru v. Purcaru*[43]. In this case, the applicant wife brought a motion to strike the husband's pleadings at the opening of trial, alleging several breaches of various non-depletion, non-dissipating and restraining orders. After hearing oral evidence about the alleged breaches, the trial judge struck the husband's pleadings and precluded him from participating in the trial before hearing the trial, which was uncontested at that point.

In striking the husband's pleadings, the trial judged noted:

> The likelihood that any realistic light would be shone on the matters in issue if the [husband] continues in my view is so slim as to be unrealistic. My preference would be to have both parties participate so that a correct factual determination could be made as to the assets to be divided and the appropriate level of child and spousal support in arrears, if any, to be fixed and calculated. But without a willing participant, the chances of doing that are nil (para. 7).

The Court of Appeal did not allow the husband's appeal and found that it was within the trial

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[39] *Supra*, Note 23.
[40] 2006 CarswellOnt 3436 (Ont. S.C.J.); affirmed 2007 CarswellOnt 6852 (Ont. C.A.).
[41] 2003 CarswellOnt 1228 (Ont. S.C.J.).
[42] 2009 CarswellOnt 1981 (Ont. Sup. Crt. Fam. Crt.).
[43] 2010 CarswellOnt 563(Ont.C.A.) per Lang J.A.

judge's discretion to strike the husband's pleadings and hear the trial on an uncontested basis. The Court noted that: "At some stage, this type of extreme misconduct will result in the loss of the recalcitrant litigant's right to participate in the proceedings." (para. 5).

The husband's breaches were particularly egregious in *Purcaru*. This is an unusual case, and the Court of Appeal was quick to underline to importance of a party's right to participate in the litigation (at paras. 47-49):

> I wholly accept Mr. Purcaru's argument that pleadings should only be struck and trial participation denied in exceptional circumstances and where no other remedy would suffice.
>
> This is particularly so in a family law case where the resulting judgment may provide for continuing obligations that can only be varied on proof of a change in circumstances. A change in circumstances may be difficult to establish if the initial judgment is based on incorrect assumptions, thus perpetuating injustice. Similarly, special care must be taken in family law cases where the interests of children are at issue. The consequences of striking pleadings or limiting trial evidence when custody or access is at issue was discussed in *King v. Mongrain* (2009), 66 R.F.L. (6th) 267 (Ont. C.A.), where Gillese J.A. observed at p. 273 that pleadings should not be struck if such a remedy leaves the court with insufficient information to determine custody. See also *Haunert-Faga v. Faga* (2005), 203 O.A.C. 388 (Ont. C.A.).
>
> The adversarial system, through cross-examination and argument, functions to safeguard against injustice.
>
> For this reason, the adversarial structure of a proceeding should be maintained whenever possible. Accordingly, the objective of a sanction ought not to be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court. As this court said at p. 23 of *Marcoccia v. Marcoccia* (2008), 60 R.F.L. (6th) 1 (Ont. C.A.), the remedy of striking pleadings is "a serious one and should only be used in unusual cases". The court also explained at p. 4 that the remedy imposed should not go "beyond that which is necessary to express the court's disapproval of the conduct in issue." This is because denying a party the right to participate at trial may lead to factual errors giving rise to an injustice, which will erode confidence in the justice system.

The above cited passage from *Purcaru* is an eloquent and articulate statement of the underlying principles that should be considered where a court is deciding whether to exercise its discretion to strike pleadings. However, we do not think the Court of Appeal's caution and summary of the law as set out above is new – striking pleadings is an extraordinary remedy and the case law has been clear for some time now about the seriousness of this remedy. Notwithstanding, the

need for a big stick is abundantly clear in the unusual cases where striking is permitted and The Court has the inherent jurisdiction to control its own process: *Hughes v. Hughes*[44]. That being said, has the release of *Purcaru* changed the way the Court responds to non compliance? We think so. We have reviewed the case law since *Purcaru* and note a more permissive trend when it comes to non-compliance: see for example *W. (L. H.) v. W. (A.E.F.)*[45] and *Kaiser v. Wein*[46]. We discuss this trend in greater detail below.

Mr. Justice Quinn has clarified in *Gordon v. Starr*[47] that it requires an "extraordinary event" to trigger the "'unless' provision" of subrule 14(23), which allows the Court to order that this subrule does not apply; the moving party must establish that an "extraordinary event" occurred on the balance of probabilities. Otherwise, the application of subrule 14(23) by the court is mandatory (see *Diciaula v. Mastrogiacomo*, *Moran v. Cunningham* and *Ferguson v. Charlton*).[48]

Where a party has had ample opportunity to bring himself into compliance with existing Orders, and the breaches are clear, the pleading will be struck. Additionally, any further steps initiated by the defaulting party may be subject to the requirement that costs be posted prior to the step being heard: *Costabile v. Costabile*[49] and *Cunningham v. LeFebvre*[50].Pleadings will only be struck where there is clear evidence of deliberate default and a complete disdain for orders of the Court: *Lugg v. Comtois*[51] and *Murano v. Murano*[52]. Generally, cases will use restraint in striking pleadings. In *Lugg v. Courtois*,[53] the father repeatedly breached a series of financial disclosure orders. Providing for early resolution or timely litigation is a fundamental objective of the family law legislative scheme in Ontario; as such, the *Family Law Rules* provide for full financial disclosure at the earliest opportunity in family law matters. With the father repeatedly and deliberately blocking financial disclosure, Justice Blishen considered whether striking his pleadings was an appropriate remedy (at para. 14):

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[44] [2007] O.J. No. 1282 (Ont.Sup.Crt., Fam.Crt.) per Quinn J., at para. 27.
[45] 2012 CarswellOnt 6566 (Ont. S.C.J.) per Kiteley J.
[46] *Kaiser v. Wein* (25 May 2012), Toronto FS-09-351069 (Ont. S.C.J.) (unreported).
[47] *supra*, note 2, at para. 16.
[48] [2009] O.J. No. 1447 (S.C.J.), at para 8, [2009] O.J. No. 2877 (Ont.Sup.Crt.), at para. 58 and [2008] O.J. No. 486 (Ont.Crt.Jus.) at paras. 55 – 64.
[49] [2004] O.J. No. 4778 (Ont.Crt.Jus., Fam.Crt.) per Perkins J. (upheld on appeal per [2005] O.J. No. 5129 (Ont.C.A.), at paras. 15, 16 and 18.
[50] [2006] O.J. No. 760 (Ont.Crt.Jus.) per Panet J., at paras. 27-32.
[51] [2005] O.J. No. 736 (Ont.Sup.Crt.) per Blishen J., at paras. 12-14.
[52] [2002] 2002CarswellOnt 3079 (Ont.C.A.), at para. 57.
[53] *supra*, note 49.

> Striking a parties' pleadings is an extreme remedy which should be used sparingly; only in cases of the most serious breaches. There must be clear evidence of deliberate default, see *Lanfrey v. Lanfrey*, 2003 CarswellOnt 2229 (Ont. S.C.J.), and a complete disdain for orders of the court, see *Woolf v. Woolf*, 2001 CarswellOnt 2993 (Ont. C.A.). As was stated by Lax J. in *Rueter v. Rueter*, [2002] O.J. No. 4477 (Ont. S.C.J.),
>
> > It is clear from the case law that courts should use utmost caution in striking the pleadings of a party. Clearly, it is very serious to deny a party the right to participate in the trial process, although in particularly egregious cases, it may be appropriate to do so: see, *Murano v. Murano*, [2002] O.J. No. 3632 (C.A.). ...

Even under these circumstances, the court ultimately decided to give the father one last chance to comply given that he had shown "considerable efforts to comply with the orders for significant, detailed, lengthy financial disclosure" but made a detailed order directing the father to comply with the outstanding orders, and with the proviso that the matter be immediately returned to Justice Blishen to show cause as to why his pleadings should not be struck should the father fail to comply within eleven (11) days.[54]

In *Murano v. Murano*,[55] the Ontario Court of Appeal confirms the court's jurisdiction to a strike a party's pleadings for failure to comply with the rules or a court order (at para. 55):

> At least three (3) provisions in the *Family Law Rules*, apart from Rule 31, allow the court to strike pleadings for failing to comply with the rules or a court order. Rule 13(17) permits the court to dismiss a party's case or strike out any document filed by a party if the party fails to obey an order to file a financial statement or fails to provide information as required in that rule. Rule 14(23) permits the court to dismiss a party's case or strike out any document filed by a party if the party fails to obey an order made on a motion. Finally, Rule 19(10) provides that the court may dismiss a party's case if the party fails to follow the production requirements set out in that rule or fails to obey an order made under that rule.

However, the court cautions against striking pleadings that are related to the interests of children (at para. 57):

> As for Mr. Murano's submission that the motions judge disregarded the best interests of the child, I agree that it is generally preferable to avoid the sanction of striking pleadings where children's interests are involved. However, in this case, the record amply supports the motions judge's decision.

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[54] *supra*, note 49, at paras. 15-17.
[55] *supra*, note 50.

In this case, the contemnor largely disregarded child support, spousal support and financial disclosure orders. Though he did make limited efforts to comply with the orders eventually, the court held that his compliance was "too little, too late" and struck his pleadings. The Ontario Court of Appeal upheld the decision, noting that the father had a remedy available to him.

Diciaula v. Mastrogiacomo[56] is an extremely unusual case where pleadings relating to parenting issues were struck on a final basis. The father had repeatedly and deliberately breached a variety of orders. Finally his disregard for court orders reached its apex; the court had previously stayed the father's motion for contempt pending compliance with four conditions and after a year he had not made any effort towards fulfilling those obligations.

More Caution since *Purcaru*?

As discussed above, some recent decisions in Ontario have relied on *Puncaru* to decline to strike a contemnor's pleadings even where, as consistent with previous case law, the contemnor has shown repeated and egregious disdain for court orders, the administration of justice, or both.

A court's decision to strike a party's pleadings in these circumstances is largely discretionary but that discretion must be exercised on a principled basis. To what extent should courts prioritize fairness and justice before they begin to condone conduct where, in the words of Justice Quinn in *Geremia v. Harb*, "the parties have gorged on court resources as if the legal system were their private banquet table"?[57]

W. (L.H.) v. W. (A.E.F.)[58]

This case exemplifies the dilemma of this emerging trend. In this decision the court provides a summary of the litigation history which spans five (5) pages, chronologically beginning on October 2010 and ending on March 20, 2012. The decision was released on April 12, 2012.

The summary describes the self-represented father's breach of several court orders including his failure to provide voluminous court-ordered financial disclosure, an instance where he

[56] *supra*, note 42.
[57] 2008 CarswellOnt 2483 (Ont. S.C.J.), at para. 94. Justice Quinn's comments were with respect to an order he made against both parties on his own initiative that they be required to obtain leave before bringing any further motions in that proceeding after a long and tortured litigation history. We think his description is apt for our present discussion even if they were not made within the context of a motion to strike pleadings.
[58] *supra*, note 44.

refused to return the children to the mother, failed to cooperate with the Office of the Children's Lawyer on two (2) separate occasions, and failed to pay seven (7) costs awards at three levels of court totaling $34,855.00 plus interest. Elsewhere the decision notes that the Father brought over a dozen motions in the twelve (12) months directly preceding this hearing.

The father was eventually restrained from bringing motions without seeking leave and restrained from emailing the mother's counsel more than once per day. He continued to bring motions without first seeking leave and continued to send Mother's counsel frequent emails on a daily basis and as the court notes, their content was at times inappropriate. In addition to the various attendances and orders, the father had served at least some ten (10) additional Notices of Motion, some with and some without affidavits, which were ultimately not filed or pursued. [59]

The court ultimately declined to strike the father's pleadings, instead imposing a strict timetable for the parties to follow, without any mention of consequences should the Father not abide by the timeline. In doing so, the court relies on paragraph 47 of *Purcaru* (see above)[60] which it interprets to stand for the legal rule that pleadings should only be struck and trial participation denied in exceptional circumstances and where *no other remedy would suffice* (para. 56).

Interestingly, Madam Justice Kiteley then goes on to consider another remedy that is specifically provided for by *Purcaru* but ultimately decides that it is actually precluded by subrule 10(5)(b) of the *Family Law Rules* (at para. 59):

> Para 59 of the reasons for decision in *Purcaru* poses another challenge in that it is explicit that the judge hearing the motion to strike pleadings is obliged to consider whether, while striking the pleadings, the party might nonetheless have some role to play in the trial such as cross-examination of a witness or making submissions at the conclusion of the trial. Rule 10(5)(b) of the *Family Law Rules* makes it clear that a party whose pleadings have been struck has no further role to play in the proceedings. Subrule 10(5)(b) was not considered by the Court of Appeal. I assume that rule 10(5)(b) means what it says. While there appears to be some limited undefined relief [*Higgins v. Higgins*, [2007] O.J. No. 3656 at para. 18; followed in *Oelbaum v. Oelbaum*, [2010] O.J.

[59] *ibid*, paras. 6-7.
[60] *supra*, note 43.

> No. 3781] from that subrule, if the motion is successful and I strike his Answer and Claim, Mr. W. will have no further participation in the proceedings.

The "limited undefined relief" is a reference to the passage in *Purcaru* which states (at para. 59)[61]:

> The trial judge did not explicitly consider providing Mr. Purcaru with other lesser forms of trial participation that may have assisted the court with its fact-finding role. For example, the trial judge did not specifically address permitting Mr. Purcaru to cross-examine his wife or her expert to test the value of her assets and liabilities. Nor did he address whether Mr. Purcaru could present argument at the conclusion of the evidence. It would have been helpful if the trial judge had specifically discussed these alternatives because a litigant denied the right to call evidence may still potentially contribute to a trial. That contribution could be made through partial or full cross-examination of one or more witnesses, or by making oral submissions on the evidence and the law. However, a review of the record in this case demonstrates several reasons why the trial judge decided against allowing Mr. Purcaru the opportunity to cross-examine or present oral argument.

It appears that the real impetus for the court refusing to strike the father's pleadings was that his "key issues" have never been heard or decided on their merits (para. 17). The court also mentions that it is not satisfied that the father's conduct was "wilful" with regard to his repeated breaches of court orders (at para. 64 (a)). Query whether a non-compliant litigant gets to have "key issues" heard, or whether this is a privilege reserved for parties who are in compliance with Court Orders. Otherwise, if the impetus for refusing to strike the Father's pleadings was that his "key issues" have never been heard or decided on their merits, surely striking the father's pleadings while granting some limited participatory rights at trial could have ensured a fair hearing on the merits while maintaining the integrity of the justice system.

Notably, Madam Justice Kiteley granted the father limited participatory rights, limited to participating in a Settlement Conference. This then leaves somewhat of a vacuum for the parties: if the matter does not settle, the father still has no standing by result of his non-compliance, but is not out of the action. What are the parties to do?There have been several

[61] *ibid.*

subsequent decisions where the Court has struggled with whether limited participatory rights should be granted to a party whose pleadings have been struck.

In *Higgins v. Higgins*,[62] the Ontario Court of Appeal explicitly acknowledges that in some cases courts should grant relief from the strict operation of Rule 10(5)(b). In this case the moving party's pleadings had been struck and the court therefore had to determine whether it should "entertain" his appeals. The court decided that he was not entitled to "special consideration" because he had made no serious effort to comply with his ongoing support obligations.

In *Oelbaum v. Oelbaum*,[63] the court acknowledges that (at para. 28):

> …the Court has inherent jurisdiction to ensure that cases are determined on their merits and that the exercise of the court process does not lead to unfairness or abuse. See *Higgins v. Higgins*, (2007), 232 O.A.C. 340, in which the Court of Appeal stated at para. 18 that there may be some cases in which a court should grant relief from the strict operation of Rule 10(5)(b) of the Family Law Rules. […]

The court goes on to determine that the principles developed under Rule 19.08 of the *Rules of Civil Procedure* (setting aside a default judgment) are helpful by analogy in guiding the court's exercise of discretion to assess whether such relief should be granted. The court states that the ultimate determination is whether the interests of justice favour such relief, which must include consideration of potential prejudice to the moving party and potential prejudice to the respondent, as well as the effect of any order the judge might make on the overall integrity of the administration of justice.

For other recent cases acknowledging that the court may strike a party's pleadings but still decide the extent to which that party may participate at trial see *Molina v. Molina*,[64] and *Nashid v. Michael*.[65]

As we have discussed elsewhere in this paper, a determination that there was a "wilful" breach of a court order only requires that the court find that the conduct was deliberate in the sense

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[62] 2007 CarswellOnt 6119 (Ont. C.A.), paras. 17-18.
[63] [2010] O.J. No. 3781 (Ont. S.C.J.), paras. 28-35.
[64] 2011 CarswellOnt 3569 (Ont. S.C.J.), para. 52.
[65] 2012 CarswellOnt 1001 (Ont. S.C.J.), para. 31.

that it was not accidental.[66] It is difficult to see how the breaches outlined in the decision could not reach this low threshold.

Azimi v. Mansoury-Tehrany[67]

The court relies on *Purcaru* to stand for the principle that pleadings should only be struck "where no other remedy is available" (at para. 20). The court notes that the self-employed applicant had significantly breached various disclosure orders for over two (2) years. Attached to the endorsement was schedule with approximately thirty (30) items of court-ordered disclosure, the majority of which was never provided or found to be deficient. The court finds that the applicant "has wilfully failed to comply with the disclosure orders" and that "much of the disclosure that the applicant failed to provide was relevant, and indeed crucial to determination of the financial issues." Then, at paragraph 31 the court states:

> I am accordingly ordering that the application be struck and that the Respondent may proceed by way of uncontested trial under Rule 23 pursuant to her Answer and Claim by Respondent. However, in light of the Applicant's comments made at the hearing that he was willing to make the disclosure, I am going to stay the order striking the Applicant's pleadings for 30 days; I do so keeping in mind the statement in *Purcaru*, supra that the intent of any order ought not to be to remove the litigant from the process, but to have that litigant provide the outstanding disclosure and comply with the orders in question. Accordingly, I am ordering that within 30 days of the date of this order, the Respondent must provide all outstanding disclosure without exception as well as file a financial statement with all required attachments including proof of current income and must also bring a motion to reinstate his pleadings. If filed, the stay will be extended until the motion is heard, and I am directing that it be returnable before me. If I order costs in this proceeding, the Applicant must pay the costs as ordered to continue the stay. I am also going to order that if the Applicant brings a motion to reinstate his pleadings, that he pay into court security for costs of the motion the sum of $2,500; I am seriously concerned that, based upon the history of this matter, that the Applicant may fail to act in good faith in providing disclosure and in reinstating his pleadings; I do not want the

[66] *supra*, note 23.
[67] 2012 CarswellOnt 2248 (Ont. S.C.J.).

> Applicant to use this provision for the purposes of delay. If he does not complete all of these steps, the Respondent may proceed by way of Form 23C uncontested trial.

Though we think it unlikely that the applicant would have submitted the disclosure that he had failed to provide for almost two (2) years based solely on comments made to the court during the hearing that he was willing to provide same, this decision is an interesting compromise and does a good job of balancing the comments made in *Purcaru* against the integrity of the administration of justice.

Bourgeois v. Bourgeois[68]

The Respondent had breached a total of six (6) court orders including two (2) disclosure orders, orders for production of an income analysis and business valuation, an order to submit intake forms to the Office of the Children's Lawyer, and an order to produce proof of an irrevocable designation of his life insurance policy. In general the court found that the evidence on the record leads to the conclusion that the respondent "has not diligently and conscientiously made reasonable efforts to place [disclosure] before the court" (para. 3).

The court cites *Purcaru* at paragraph 16 to stand for the principle that pleadings should only be struck "where no other remedy would suffice" and then states (at para. 17):

> However, by the slimmest margin, I find that striking the respondent's pleading is not the most reasonable course of action for the reason that, now almost two years since the original disclosure orders, the respondent has made further efforts at disclosure which are substantially better than his initial efforts. I am also not convinced that his recalcitrance is an attempt to mislead the court or to be dishonest, as the evidence falls short of this type of fraudulent activity.

The court then attaches a schedule to the endorsement listing the steps that the respondent must take within approximately two months from the date of the judgment or else the court states that the applicant may move to strike the respondent's pleadings and which the court makes clear that it would absent extremely compelling circumstances outside of the respondent's control

[68] 2011 CarswellOnt 6571 (Ont. S.C.J.).

Kaiser v. Wein[69]

This is an interesting case because the court decides to strike the father's pleadings with respect to financial issues but not with respect to custody and access. The extent of the father's noncompliance is not described in the decision because it was not in dispute that the father had a history of noncompliance and the father even conceded that there was sufficient a sufficient basis upon which the court might exercise its discretion to strike his pleadings.

The court notes that there is a distinction to be drawn between financial and parenting issues when requesting that pleadings be struck, and decides that the father's claim for access should not be struck out on the basis of noncompliance because it is preferable that a determination of the children's best interests be made with the input of both parents.

The court does acknowledge that there is precedent where a party's pleadings have been struck in relation to a joint custody claim where it was unrealistic. The court briefly considers the merits of the Father's claim before deciding that since the father was still an active part of the children's lives, it was not prepared to decide his joint custody claim without his input.

If Striking Does Not Work, Stay the Pleadings

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.[70]

In order to satisfy a stay of proceedings, two (2) conditions must be met:

(a) the moving party must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to that party or would be an abuse of process in some other way; and
(b) the stay must not cause an injustice to the responding party.

In both, the burden of proof is on the moving party: *Varnam v. Canada (Minister of National Health & Welfare)*[71].

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[69] *supra*, note 45.
[70] Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.
[71] [1987] 1987 CarswellNat 253 (Fed.Crt.T.D.), per McNair J., at para. 7.

In cases where there is a history of active litigation, conduct disobeying court orders, and unfulfilled support obligations, the court will generally find that the defaulting party's conduct is inappropriate and unreasonable: *Andrews v. Andrews*[72] and *DiMillo v. DiMillo*[73].

However, it bears repeating that the remedy of staying is a discretionary one: *Dickie v. Dickie*[74].

Conclusion

The Province of Ontario passed a law a few years ago prohibiting the use of cell phones and other smart phones while operating a vehicle. The purpose of the law is to discourage unsafe driving practices. While there was an initial grace period, the police have since actively ticketed where a driver is caught speaking on or texting on a cell phone or smart phone while driving. Now, particularly in the City of Toronto bluetooth and similar devices abound. Why? Because we know there will be a consequence for failing to comply with the law.

If a party to a proceeding is clear that there will be consequences for failing to comply with a court order and that there will either be the strong possibility of a finding of contempt or a striking of pleadings, it stands to reason that the party in question will make better efforts to comply with court orders. Further, these consequences send a message from the court about the importance of the orders that its brother and sister judges make: the orders are important, deserve respect, and compliance is not an option but an obligation.

The Ontario Court of Appeal has made it clear that striking pleadings is a remedy of last resort and that the adversarial structure of a proceeding should be maintained wherever possible to safeguard against injustice. Unfortunately, if courts blindly pursue a paradigm of justice that requires allowing a repeat-offender contemnor to participate as an equal party, the courts may well become complicit when the consequent injustice shifts onto those opposing parties who are attempting to litigate in good faith. In some situations, striking pleadings and granting reduced participatory rights to non compliant parties might appropriately address these competing interests. As we have seen, another effective compromise that courts have been implementing is granting the contemnor "one last chance" such that the pleadings will be struck within a set

[72] [2000] 2000 CarswellOnt 311 (Ont.Sup.Crt.) per Nelson J., at paras. 8-14.
[73] [2007] 2007CarswellOnt 358 (Ont.Sup.Crt.) per Mazza J., at paras. 21-23.
[74] [2007] O.J. No. 1749 (Ont.Sup.Crt.), per Thorburn J., at para. 47.

time period if the contemnor has not sufficiently complied with the outstanding court orders within that time. As counsel, we should also be reinforcing the importance of court orders by:

- ensuring that our clients have copies of each and every order and endorsement that is made by the court by electronic and paper means;
- writing a reporting letter to our clients each time an order is made, clearly reminding the client of their obligations under the order;
- ensuring that we have bring forward systems so that, if an order provides that a client must produce disclosure by "x" date, we have a bring forward copy of the order at least ten (10) days prior and can provide written and oral follow ups to the client;
- providing our clients with copies of the relevant provisions in the *Family Law Rules*; and
- diligently pursuing any breaches if we are acting for the non-offending party, which includes bringing motions promptly and seeking orders that matters be peremptory on the offending party wherever possible.

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A Creative Way of Settling Equalization or Support Obligations

William Abbott
MacDonald & Partners LLP

Friday, September 21, 2012

Ontario Bar Association
Continuing Professional Development

A CREATIVE WAY OF SETTLING EQUALIZATION or SUPPORT OBLIGATIONS

William Abbott

MacDonald & Partners LLP

Introduction

The following paper provides a creative solution on how to fund an equalization payment from one spouse to the other, how to creatively deal with spousal support, and / or how to pay one spouse for money owing for some other reason. A court will not impose the solutions set out below so it is one that needs to be agreed on between the spouses.

Divisive Reorganization or Butterfly Transaction

Canada Revenue Agency (CRA) allows for a Divisive Reorganization or Butterfly Transaction (hereinafter referred to collectively as a Butterfly Transaction). Unfortunately nowhere in the *Income Tax Act* is there a definitive description of how to achieve a Butterfly Transaction or the relevant rules that govern the same.

The term Butterfly was first used in reference to divisive corporate reorganizations at the 1977 annual conference of the Canadian Tax Foundation[1]. Today the *Income Tax Act*[2] specifically deals with the elements necessary to have a valid Butterfly transaction while

[1] Robert J. Dart "Demergers," in *Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: Canadian Tax Foundation, 1992), 13:1-38, at 13:3.

[2] R.S.C., 1985, c. 1 (5th Supp.) http://laws-lois.justice.gc.ca/eng/acts/I-3.3/index.html

not specifically using the phrase. The specific provisions of the *Income Tax Act* that are relevant to the implementation of a Butterfly transaction are:

i. Subsection 52(2);
ii. Subsection 55(2);
iii. Subsection 55(3)(a)
iv. Subsection 84(3);
v. Subsection 85(1);
vi. Subsection 85.1
vii. Subsection 85(2.1)
viii. Subsection 86; and
ix. Subsection 112(1)

The main criteria that must exist for a true Butterfly transaction is that the spouses cannot yet be divorced. In the case law set out below there are examples of the court delaying the severing of the divorce to see if a Butterfly Transaction can be completed. There appears to be no ruling from CRA if a Butterfly Transaction is available to separating common-law spouses where a joint family venture is conceded by the parties.

A Butterfly Transaction is extremely complex and cannot be undertaken by the lawyers representing the parties. To complete a Butterfly Transaction the person owing the equalization payment (or joint family venture payment) or the lump sum support payment must be the owner of a closely held corporation. An accountant (or accountants) familiar with this area of the *Income Tax Act* along with corporate lawyers

will have to be retained. It is also prudent to obtain an advance ruling[3] from CRA that they will recognize the transaction as acceptable. This is imperative as even though the *Income Tax Act* has provisions dealing with Butterfly Transactions**,** they vary dependent on interpretations by individuals working at CRA. Failure to obtain an advance ruling may lead to CRA attacking the transaction at a later date and the lawyer (depending on the degree of involvement) having to call Law-Pro. If a Butterfly Transaction does not satisfy section 55(3)(b) of the *Income Tax Act* and if the corporations involved receives a dividend**,** that dividend shall be treated as a capital gain and the resulting tax consequences may likely be fairly significant. The biggest concern for CRA with Butterfly transactions are to prevent:

i. What really is a sale or barter type transaction that would normally be subject to tax[4];
ii. Tax-free liquidation of a shareholder[5]; or
iii. Obtaining some form of inappropriate tax advantage[6].

It is a costly exercise given the professionals that are required and as such a Butterfly Transaction only makes sense to complete when dealing with a substantial equalization payment or a large lump sum support payment.

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[3] *Information Circular* 70-6R4, "Advance Income Tax Rulings," January 29, 2001, paragraph 6. An advance tax ruling is obtained by CRA and is a statement setting out how CRA will apply the *Income Tax* Act to the transaction in question. The ruling is binding on CRA and will provide the necessary assurances to the clients that they transaction is acceptable.

[4] See section 55(3.1) of the *Income Tax Act*

[5] See section 55(1) of the *Income Tax Act*

[6] While not specifically spelled out this seems to be the overall objective of section 55 of the *Income Tax Act* if not the entire *Income Tax Act* itself.

There are essentially two types of Butterfly Transactions; a related party Butterfly and an unrelated Butterfly. Spouses are deemed to be related for the purposes of a Butterfly transaction.

The Basics of How the Butterfly Works

To determine whether or not a Butterfly Transaction will work for your clients the following is a simplified version of what can occur to complete the tramsaction:

1. The indebted party will transfer a percentage of their common shares in their company (Company A) into a newly incorporated company owned by the recipient (Company B) and take back shares of Company B;
2. Company A will roll over the assets[7] of the business it wishes to place in Company B and take back preferred shares of Company B;
3. Company A will repurchase for the cancellation of its common shares held by Company B and issue a promissory note as consideration to Company B. This will trigger a deemed dividend a for Company B and a deduction on taxes
4. Company B shall then redeem the preferred shares held by Company A and issue a promissory note as consideration. This will trigger a deemed dividend for Company A and a deduction on taxes
5. The promissory notes held by Company A and Company B will be set-off against each other. The notes are of equal fair market value thereby resulting in no tax repercussions to either Company A or Company B. The original shareholders of Company A now hold shares in both companies.

[7] The *Income Tax Act* does not define the type of property that may be transferred but CRA has generally accepted that cash, near cash, business assets and investments assets are acceptable

Example of a Related Butterfly

The most important aspect to be concerned with is to make sure that the reorganization with the transfer of assets is not deemed by CRA to be a form of dividend as this may then lead to capital gains being payable. The related Butterfly Transaction is easier to accomplish than the unrelated Butterfly as there are less restrictions with CRA. A related Butterfly Transaction does not need to comply with the *pro-rated* mandated by CRA with unrelated Butterfly Transactions.

By way of example where a Husband and Wife each own 50% of the common shares of Company A. Company A owns a business worth $1,000 and an investment portfolio worth $500. The wife runs the business and the husband manages the investments. The husband and wife are divorcing and want to divide the assets of Company A without realizing tax on the company assets at this time.

To accomplish this, the wife would buy 16% of Company A from her husband thereby increasing her ownership to 66% and allowing the asset to divided according to fair market value.

After the reorganization, the husband and the wife would each have their own corporations with control of the investments ($500) and business ($1,000).

Example of Paying for Arrears of Support Between Unrelated Parties

In this example (taken from an actual case two years ago) the spouses were divorced. It was subsequently discovered the husband had an undisclosed bank account and had used undue pressure in his wife to execute a separation agreement. It was abundantly clear on the eve of trial that the separation agreement was going to be set aside.

Based on the above, the former spouses came to an agreement which they incorporated into Minutes of Settlement for what can best be described as a quasi Butterfly Transaction. None of the terms of the transaction were incorporated into the final order.

The total amount owing to the Applicant by the Respondent for arrears of child support, section 7 expenses and spousal support, lump sum spousal support, equalization interest and costs was fixed at $430,000.00.

It was then agreed that this sum would be paid in two instalments: the first payment in the sum of $250,000.00 was paid concurrent with the execution of the Minutes of Settlement and upon closing of the corporate transactions described. The balance of $180,000.00 was then paid in the next calendar year[8].

To complete the payment by the former husband to the former wife each party agreed to fully co-operate with the following steps:

A. Step 1 – Reorganize 1234567 Ontario Inc's shares (former husband's company)

I. A reorganization of the shares of 1234567 Ontario Inc. was undertaken, such that 100,000 Class A special shares, with a fair market value and adjusted cost

[8] This was done to reduce some taxes as the former wife had nominal / no income as described below

base of $100,000, was created, and 330,000 Class B special shares, with a fair market value of $330,000 and a nominal adjusted cost base, was created.

B. Step 2 – Transfer special shares of 1234567 Ontario Inc. to the former wife

I. The former husband transferred the 100,000 Class A special shares to the former wife at their cost and fair market value of $100,000.

II. The former husband transferred 29,000 Class B special shares to the former wife at fair market value, creating a capital gain to the former husband of $29,000.

III. The former husband transferred 301,000 Class B special shares to the former wife at a cost of nil, using the rules provided for in the *Income Tax Act*.

IV. As a result of the transfers, the former wife held $430,000 worth of shares of 1234567 Ontario Inc; $100,000 worth of Class A special shares with an adjusted cost base of $100,000, and $330,000 worth of Class B special shares with an adjusted cost base of $29,000. Appropriate elections were filed for tax purposes relative to the transfers.

C. Step 3 – Redemption and purchase of shares from the former wife

I. 1234567 Ontario Inc. redeemed 50,000 of the former wife's Class A special shares in each of 2010 and 2011, paying her $50,000 upon each redemption. The redemptions resulted in her receiving a dividend of $50,000 in those years, as well as a capital loss of $50,000. The 2010 redemption was done within 30 days of the Minutes of Settlement being signed and the 2011 redemption was done on a specified date in January, 2011

II. The former husband then purchased 200,000 of the former wife's Class B special shares in 2010 and the remaining 130,000 Class B special shares in 2011. The former wife then had a capital gain in 2010 of $182,425, offset by a capital loss of $50,000, for a net capital gain of $132,425. The former wife then had a capital gain in 2011 of $118,575, offset by a capital loss of $50,000, for a net capital gain of $68,575.

2. As a result of the indemnification for extra taxes the former wife warranted that had $10,000.00 of other income in 2010 and 2011 and would claim the equivalent to married exemption for the minor child in her custody. On the basis of this warranty the former husband agreed to wholly indemnify the former wife for all additional taxes, professional fees or penalties of any kind which she incurred as a result of the corporate reorganization, share transfers and subsequent purchases and redemptions contemplated above. It was further agreed that the former wife's income taxes would be calculated by her accountant for 2010 and 2011 as if the above transactions had not occurred, based on her income from other sources only, and the total income tax payable (as well as any impact this calculation may have on

her eligibility for various government grants, benefits and credits as a low income single parent) but excluding the loss of any benefits for she is no longer entitled to as a result of the lump sum money she is receiving. This was then compared to her income tax liability and eligibility for government grants, benefits and credits after taking the transactions above into account. The former husband agreed to forthwith pay to the former wife the difference between the two sums upon receipt of the calculations prepared by the accountant.

3. The parties then agreed that the former husband would enter into an agreement acceptable to the former husband as prepared by his corporate lawyer where he is bound to acquire the Class B special shares, and to redeem the Class A special shares. The parties executed a shareholders' agreement for the period the former wife was a shareholder of 1234567 Ontario Inc. When filing her income tax returns, it was agreed that the former wife would not claim a Capital Gains Exemption in 2010 or 2011 relating to the sale of the Class B special shares as the shares did not qualify for this exemption. This term / provision was recited in the shareholders agreement the parties executed.

4. There was obviously a risk to the former wife if the former husband's company became insolvent or would not / could not pay the monies when due. To secure the balance owing by the former husband and estimated taxes owing for 2010 and 2011 to the former wife, he agreed to a mortgage being placed on his home of $230,000.00. The mortgage was subsequently discharged upon all payments being

made and CRA issuing the Notice of Assessment to the former wife for the 2011 tax year.

The Case Law

A search of the Westlaw database in Family law using the key word of Butterfly Transaction or Divisive Reorganization reports the following cases:

In *Hughes v. Hughes*[9] the Applicant wife and Respondent husband separated after 24 years of marriage. The husband worked during the marriage as a lawyer and had a real estate holding company. The husband owned 75% of the Holding Company and the wife owned 25%. The wife had nominal involvement in the business. Justice Deschenes notes that the husband argued strenuously that in ordering an equalization payment, certain properties contained in the real estate holding company should be transferred to a company owned by the wife by a Butterfly Transaction to minimize tax implications. The wife opposed such an arrangement as she did not want to become a landlord. Justice Deschenes agreed and indicated that the Court should not impose such a scheme upon her.

In *Hodgkinson v. Hodgkinson*[10] the Applicant wife and Respondent husband separated after 9 years of marriage. The husband owned several companies that were involved in buying and selling investments. The Respondent had an expert valuation done of his companies by a Chartered Business Valuator who also testified at trial. The expert

[9] 1997 CarswellND 269 (Q.B.)

[10] 2003 CarswellBC 2461 (S.C.)

testified about the tax that would be incurred if certain assets in the companies had to be liquidated to satisfy an equalization payment. The expert went on to state (paragraph 53) that it was appropriate to have an *in specie* division of corporate assets held by two of the husband`s companies and that to minimize tax it should be done by a Butterfly Transaction. The wife argued that the court did not have jurisdiction to order the transfer of specific assets within the corporation to satisfy the equalization unless the parties agreed. Justice Dillon noted that there do not appear to be any cases wherein the specific assets of a corporation have been ordered divided *in specie.* This is because it is the shares that are the family asset and not the assets of the corporation itself. Justice Dillon did however briefly postpone the equalization and granting of the divorce to allow the parties to organize their affairs in a matter satisfactory to the wife so as to maximize any available tax planning.

On appeal[11] the Wife noted that the parties did not complete a Butterfly transaction which was contemplated in delaying the equalization and divorce. The wife argued on appeal that she was entitled to an *in specie* division of assets and wished to reargue this issue as it related to division of family assets. The Court of Appeal rejected this argument.

In *Kirk v. Kirk*[12] the Applicant wife and Respondent husband separated after a thirty year marriage. The matter came before Justice Arnold-Bailey eight years after separation on motion of the husband who was seeking to severe the divorce from the

[11] 2006 CarswellBC 767 (C.A.)

[12] 2007 CarswellBC 138 (S.C.)

corollary issues. Subsequent to separation the Husband had enjoyed considerable financial success. Justice Arnold-Bailey refused to severe the divorce and allow it to proceed prior to the resolution of the monetary issued as the husband's company shareholder agreement specifically stated that shares could only be transferred in the company to a spouse or child. The wife`s lawyer argued the shareholders agreement would preclude a butterfly transaction if the parties were divorced. On this basis as well as three others the motion to severe the divorce was denied[13].

In *Weber v. Weber*[14] the issue was not whether or not a Butterfly transaction was to be used to satisfy a debt owing between a husband and wife, but whether the Respondent husband actually had a debt to his father for a Butterfly transaction that had occurred during marriage. Justice Herold notes that in 2004 as a result of John and Walter Weber being unable to work together they entered into a Butterfly Transaction. His Honour found that the debt owing under the terms of the Butterfly Transaction was legitimate.

In *Racz v. Rudolph*[15] the Applicant wife (Respondent in Appeal) and Respondent husband (Appellant) reached a settlement for the husband keeping the shares of his closely held corporation. The day after the settlement the mining company in which the husband held a large block of shares announced it was closing which caused his share

[13] The author's opinion is that if the only ground for denying the divorce was to preclude a Butterfly Transaction then the divorce would have been allowed. The primary reason to deny the divorce was likely the husband excluding the wife under his will. If the parties were no longer spouses and the husband dies, the wife would no longer have status under the *Wills Variation Act*, R.S.B.C. 1996, c. 490

[14] 2008 CarswellOnt 9365 (S.C.)

[15] 1998 CarswellYukon 57 (C.A.)

value to plummet. When the husband refused to complete the terms of the settlement the wife moved to enforce the terms at which time the husband was ordered to complete the settlement terms and pending the completion his assets were frozen. The husband appealed. The appeal was dismissed. It would appear the Butterfly transaction was ordered as this is what the parties consented to on the first day of trial when they executed the terms of their settlement.

Ravoy v. Ravoy[16] is the only case found in the Carswell family law database where the trial judge ordered a Butterfly transaction be completed to deal with two vacant lots which was upheld on appeal. The Husband and Wife separated after 24 years of marriage. The wife was unable to conduct her own affairs and had a litigation guardian appointed. Professor James McLeod points out in his annotation that the husband`s own expert testified there was an issue with regards to the value of the property, that a Butterfly transaction was available and that the Wife was prepared to pay the cost of completing the transaction. The Wife did not object to the Butterfly transaction so there was no basis for the Husband to object to what his expert recommended. The Husband on appeal complained the trial Judge failed to take into consideration the tax consequences of the Butterfly transaction but this was rejected as limited evidence on this point was put before a trial judge.

In *Bright v. Leslie-Bright*[17] the Applicant husband and Respondent wife separated after 15 years of marriage. The parties owned two Tim Horton`s franchises in the Niagara

[16] 2001 CarswellAlta 1683 (C.A.)

[17] 2011 CarswellOnt 3207 (S.C.), additional reasons at 2011 CarswellOnt 10403

Falls. It was agreed early in the proceedings that they would complete a Butterfly transaction whereby each party would take one store. At the time of trial the Butterfly transaction had still not been completed as the Husband and Wife could not agree on final numbers for the values. Both parties had retained experts to substantiate the values attributed to the stores. Justice Maddalena ordered that a Butterfly transaction be completed on the basis that a letter of agreement was entered into for its completion. The monetary values to be used were the average between the two expert reports. She ordered that the divorce not be completed until the Butterfly transaction was completed after which it would proceed by affidavit on an uncontested basis. The Husband wanted the Butterfly transaction and was more successful in implementing the terms after a 26 day trial where the wife was self-represented.

There is also the case of *Galbierz v. Galbierz*[18] which is not so much about a Butterfly transaction but whether the Husband and Wife had a binding agreement. The Husband and Wife enter into a Consent Order which was not yet issued and entered. The wife believes the deal was not good and seeks to set aside the consent. The Trial Judge refused to set aside the consent. The Court of Appeal mentions that the parties agreed to complete a Butterfly transaction and were not prepared to set aside the consent.

Conclusion

Where substantial sums are involved and spouses are willing to cooperate and engage professionals, money can be saved and taxes minimized. CRA has been inconsistent

[18] 2002 CarswellBC 3125 (C.A.)

in what transactions they will and will not allow and as such an advance ruling from them is imperative. Butterfly Transactions and the rules governing them are afflicted by great uncertainty and continue to be one of the most convoluted tax issues to complete. It is simple from the corporation's standpoint to acquire eligible assets on a tax deferred basis from other corporations. Despite this it remains arduous to remove an asset on a tax-deferred basis from one corporation to another. This appears to be primarily because of CRA's approach on an administrative level to Butterfly Transactions.

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Davis v. *Crawford* and Subsequent Lump Sum Spousal Support

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Friday, September 21, 2012

Ontario Bar Association
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Davis v. *Crawford* and Subsequent Lump Sum Spousal Support Decisions

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In 2011 a five-judge panel sitting in the Ontario Court of Appeal decided *Davis v. Crawford*[1] ("*Davis*"). This decision has provided the Bench and Bar with direction as to when and why lump sum spousal support should be awarded. In *Davis* the Ontario Court of Appeal stressed the importance of the appearance of consistency and predictability in the making of these awards; however, it also made clear that there are a wide range of factors which may render such an award appropriate.

The precedent established in *Davis* outlining the principles and considerations that govern a lump sum award and the circumstances where such a result would be appropriate have been upheld and have received positive treatment. Outside of Ontario, at least two British Columbia Supreme Court judges have looked to *Davis* for guidance on the issue of when to award a lump sum spousal support.[2]

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[1] 2011ONCA 294 [*Davis*].
[2] *Robinson v Robinson*, 2011 BCSC 1489 at para 96 [*Robinson*]; *Brandl v Rolston*, 2012 BCSC 902 at para 84 [*Brandl*].

***Mannarino* and the *Acts*:**

Prior to the decision in *Davis*, the primary authority on this point of law was enunciated in *Mannarino v. Mannarino*[3] which provided an extremely limited and restricted understanding of an award of a lump sum spousal support and the "very unusual circumstances" in which a lump sum award was deemed appropriate. However, lacking statutory support for such a narrow interpretation, the Ontario Court of Appeal in *Davis* rejected the strict approach employed in *Mannarino* and turned to the legislation in support of a broader and more flexible standard in the court's determination of when a lump sum order may be appropriate.

Section 15(2) of the *Divorce Act*[4] provides:

> A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Section 34(1)(a) and (b) of the *Family Law Act*[5] provides:

> 34(1) In application under section 33,the court may make an interim or final order,
>
> (a) requiring that an amount be paid periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;
>
> (b) requiring that a lump sum be paid or held in trust.

The *Divorce Act*, along with the *Family Law Act* and various other provincial statutes with similarly worded provisions, confer a broad discretion on judges to make an award for periodic or lump sum spousal support, or to make an award comprising both forms of support.[6] The overall effect of

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[3] (1992), 43 RFL (3d) 309 (ONCA) [*Mannarino*].
[4] 1985, c 3 (2nd Supp).
[5] RSO 1990, c F-3.
[6] *Davis* at para 52.

Davis has been to clarify the law on this point, emphasizing that the *Divorce Act* in particular draws no distinction between lump sum and periodic support, nor does its legislative history reveal any intention on the part of Parliament to impose and special restrictions on the use of lump sum spousal support.[7]

Purpose versus Effect

The principles established in *Davis* make it clear that the court is not restricted to award lump sum spousal support in rare cases as was held in *Mannarino* and that it should be approaching the issue of spousal support and the appropriateness of a lump sum award on a case by case basis. While it is undisputed that a lump sum award should not be made in the guise of support for the purpose of redistributing assets, the purpose of an award must always be distinguished from its effect.[8] However, this does not automatically preclude a lump sum from being awarded; what is required to justify a lump sum order is that "there should be a valid reason for not making a periodic support order which will usually be paid from the payor's income."[9] To that end, the question becomes what is the underlying purpose of any particular order beyond its effect, taking into account the fact that a lump sum award will always have the inevitable effect of transferring assets from one spouse to the other.

The identification, in *Davis*, of a clear differentiation between the purpose and effect of an order has a significant impact for judges who must decide if a lump sum is the most appropriate award. *Davis*

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[7] *Ibid* at para 54-58.
[8] *Ibid* at para 62.
[9] *Willemze-Davidson v. Davidson* (1997), 98 OAC 335 at para 31.

alters how courts must interpret the redistribution of assets on this point, looking beyond the effect and rather towards the purpose of an order given the particular circumstances of the case in question.

Ability to Make a Lump Sum Payment

In *Davis*, the court refers to the *Family Law Act*[10] to demonstrate that the ability to pay is also an important consideration when determining the amount and duration of the award in relation to the appropriateness of a lump sum award and in distinguishing between the overall purpose and effect of an order.[11] In determining whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency, courts have followed suit in their consideration of this factor. In *Stevens v. Stevens*,[12] the court maintained that "one of the central considerations to keep in mind when considering a lump sum payment is the payor's future self-sufficiency."[13] With application to the facts, the court found that the payor's income from the commencement of his business in 1993 to the start of litigation demonstrated that he would remain financially viable, as he has been throughout the marriage, if such an order was made against him.

Alternatively, the British Columbia Supreme Court in *Brandl* held that limited income and the perceived inability to make a lump sum payment warranted a periodic maintenance award rather than a lump sum award in consideration of the payor's ability to sustain himself in the future in each circumstance.[14] Similarly, in *Decaen v. Decaen*[15] the court considered the redistribution of capital

[10] RSO 1990, c F-3 s.33(9).
[11] *Davis* at para 65.
[12] 2012 ONSC 706.
[13] *Ibid* at para 251.
[14] *Supra* note 2 at para 85.

and relied on *Davis* to uphold an order for periodic spousal support. It was held that although Ms. Decaen was entitled to alleviate, to the extent possible, the economic disadvantages suffered by her and thus was entitled to one half of her husband's pension, the ability of the payor to realize a lump sum award was held to be as an overriding factor under the circumstances of this case.[16] The same is true in *Peel v. Peel*,[17] where the payee's inability to prove financial hardship, combined with the reality that a lump sum order would require the payor to sell assets or borrow against them, resulted in the dismissal of a claim for a lump sum award.[18]

Advantages v. Disadvantages

Most importantly, *Davis* requires that a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order beyond the payor's ability to pay.

The factors a court *must* consider that were held in *Davis* are reproduced below:

> 67. The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example: short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.

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[15] 2012 ONSC 966.
[16] *Ibid* at para 269.
[17] 2012 ONSC 761.
[18] *Ibid* at para 113.

> 68. Similarly, the disadvantages of such an award can include: the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
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> 69. In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.[19]

Davis reinforces the point that trial judges are in the best position to make such considerations as the relevant factors are highly variable and case-specific and, therefore, appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.[20]

This was confirmed in *Aksman v. Shenderey*[21] where it was held that "[t]he trial judge was entitled to order lump sum support. These orders are discretionary and case specific, and can be justified by a wide variety of circumstances."[22] The appellate court reviewed the trial judge's reasoning and found that they provided for an adequate foundation for the lump sum order and fulfilled the requirement to weigh all relevant factors set out in *Davis*. The predominant reasons which warranted a lump sum award were that: there was significant concern that the respondent would arrange his affairs and income so as to defeat a periodic support order, the parties had been

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[19] *Davis* at paras 67-69.
[20] *Ibid* at para 77.
[21] 2011 ONCA 816.
[22] *Ibid* at para 10.

separated for a long period of time, the disparity in the parties' financial incomes as well as the desirability of a clean break.[23]

In *Zenteno v. Ticknor*,[24] the Ontario Court of Appeal confirmed that *Davis* is the principal authority in dealing with the correctness of a trial judge's order of a lump sum spousal support payment. The court noted that in respect of the high standard of review of a trial judge's determinations, and lacking any clear indication that the lump sum award was based on an error in principle, limited evidence in and of itself does not bar the appropriateness of a lump sum award being made. The court held that although there was limited evidence, it sufficiently demonstrated that the appellant's abusive behaviour, intention not to pay spousal support, and probable non-compliance with a court order were enough to justify the judge's order of a lump sum payment of spousal support.[25]

In *Beck v. Beckett*,[26] the Ontario Court of Appeal reviewed the trial judge's considerations and found that an overwhelming number of the factors outlined in *Davis* told against a lump sum award.[27] The appellant's principal submission was that there was a real risk that the respondent would not comply with an order of periodic support payments made by the trial judge. This submission was based on two instances: the respondent did not pay a costs order and second, that he did not make the child support payments ordered by the trial judge. However, the Court of Appeal found that this was not enough to outweigh all of the existing evidence in favour of an order of periodic support. Counsel for the respondent explained that the respondent did not have sufficient

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[23] *Aksman v. Shenderey*, 2010 ONSC 3559 at para 101.
[24] 2011 ONCA 722 at para 4.
[25] *Ibid* at para 5.
[26] 2011 ONCA 559.
[27] *Ibid* at para 22.

funds because his share of the proceeds from the house remained in trust and his pension was his only current income.[28] Therefore, the payor's temporary inability to fulfill a court order was not enough to displace the overwhelming factors that remained in favour of a periodic award.

However, where the concern with respect to non-payment of a periodic support order is a valid one, the court will give more weight to this factor, especially where corroborating factors are present. This was the case in *Brière v. Saint-Pierre*.[29] Not only had the payor immediately gone into arrears and accumulated $57,465.99 of unpaid spousal support, but his pattern of behaviour demonstrated that there was a real risk that he would not provide periodic support in the future. Multiple times throughout the proceedings the payor had significant funds at his disposal and yet he consistently and deliberately failed to comply with the periodic spousal support order, while simultaneously failing to provide accurate and complete financial disclosure. The court was legitimately concerned that without a lump sum award the respondent would be forced into unending litigation in order to maintain her entitlement to support and, therefore, a lump sum award was found to be the appropriate order in this case.[30]

In weighing the relevant factors according to *Davis*, the court in *Robinson* accepted the wife's submission that a clean break was desirable. In support of this, although there was no indication of non-payment, there was some concern of late payments combined with the payor's recent relocation abroad and his new financial responsibilities involving his new partner.[31] The court considered the consequences of the fact that the payor lives outside of Canada, finding that periodic spousal

[28] *Ibid* at para 23.
[29] 2012 ONSC 421.
[30] *Ibid* at para 29.
[31] *Supra* note 2 at para 99.

support would be increasingly difficult to collect if an issue of non-payment did arise, as well as the problem of the absence of a corresponding tax deduction. Furthermore, the court held that "a lump sum is appropriate in circumstances where the payor spouse has insufficient income to pay on an ongoing basis, but has capital assets with which to satisfy an award."[32] This case exemplifies the rationale employed in *Davis* in relation to relevant considerations that are case-specific and that will impact an award of spousal support. Here, the court applied *Davis* to the unique facts of this case and found that the advantages of a clean break outweighed the minimal tax benefit of periodic payments, ultimately holding that it was an appropriate scenario for spousal support to be paid by way of a lump sum.[33]

In *Grimba v. Bossi*[34], on an application by the husband to terminate spousal support, an order for a lump sum was awarded instead. In this case, the parties separated in 2004 after a 19-year marriage and had two children in post-secondary education. The husband's claim was that the wife had now reached self-sufficiency and therefore was not entitled to further spousal support, which resulted in him ceasing to pay both spousal support and child support. Upon review of the spousal support agreement, the court considered *Davis* and the relevant factors to be considered in awarding a lump sum. The court held that while the circumstances of both spouses had changed substantially since their separation, the wife was out of the workforce for thirteen years, from 1995 to 2008, and she was not advancing her career during this time as she was at home to care for the children.[35] The trial judge found that these factors outweighed the husband's claim greatly and the fact that the wife had rejoined the workforce did not discharge her entitlement to spousal support. Rather, the wife

[32] *Ibid* at para 103.
[33] *Ibid* at para 106.
[34] 2012 ONSC 1386.
[35] *Ibid* at para 32.

could not be said to have achieved economic self-sufficiency given the standard of living the parties would have enjoyed from their joint incomes if they had stayed together. Given the husband's refusal to make payments, and the existing animosity between the parties and the reflected inability to agree on the duration and quantum of spousal support in the separation agreement, it was held that a lump sum award was the most appropriate response under the circumstances.[36]

Consistency, Predictability and the Appearance of Justice in Awarding Lump Sum Spousal Support: The Responsibility of Counsel and the Court

Since the Ontario Court of Appeal's decision in *Davis*, courts in Ontario and British Columbia have responded positively and now consider *Davis* to be the principal authority in considering the appropriateness of a lump sum spousal support award. *Davis* reinforces the fact that courts have the discretion to impose a lump sum award and identifies a more liberal approach that is more aligned with, and supported by, relevant federal and provincial legislation.

Davis also, however, speaks to the importance of the appearance of justice in the making of lump sum spousal support awards and provides a clear directive as to the responsibility of counsel and the court in this respect:

> 75. Irrespective of whether the proposed support is periodic or lump sum, it is incumbent upon counsel to provide the judge deciding the matter with submissions concerning the basis for awarding and the method of calculating the proposed support, together with a range of possible outcomes. Further, it is highly desirable that a judge making a lump sum award provide a clear explanation of both the basis for exercising the discretion to award lump sum support and the rationale for arriving at a particular figure. Clear presentations by counsel and explanations by trial judges will make such an award more transparent and enhance the appearance of justice.

[36] *Ibid* at para 38.

Over time, this approach will undoubtedly foster greater consistency and predictability in the result. (*Ibid* at para. 75)

It is, for example, imperative to ensure that lump sum spousal support awards take into account income tax consequences, given that periodic spousal support is tax-deductible for the payor. Another concern is the inability of a lump sum payor to have the award reviewed or changed in the event of a material change of circumstances, a right that is open to periodic support payors. This certainly remains an argument in favour of periodic support given the inability of parties, counsel, or judges, to predict the future.

In terms of quantum, the Ontario Court of Appeal suggests in *Davis*, as it did with periodic support in *Fisher* v. *Fisher*, that a part of the approach to determining if a lump sum spousal support award quantum is appropriate is to "consider whether the support awarded is in keeping with the *Spousal Support Advisory Guidelines*:

As part of this approach, where an award of lump sum spousal support is made as a substitute for an award of periodic support, it is preferable that, with the benefit of submissions from counsel, judges consider whether the amount awarded is in keeping with the *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice, 2008) (the "*Guidelines*"). If it is not, some reasons should be provided for why the *Guidelines* do not provide an appropriate result: *Fisher* v. *Fisher* (2008), 88 O.R. (3d) 241.

Although the decision to award lump sum spousal ultimately rests on the specific facts of each case, the decision in *Davis* provides a starting point for trial judges to adduce and weigh relevant factors in deciding whether a lump sum award is appropriate, and what quantum of award is appropriate, in a manner that is transparent, and grounded in reasoning and fairness, while leaving the trial judge's statute-protected discretion intact.

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Lump Sum Spousal Support: Refining A Blunt Instrument

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Lump Sum Spousal Support: Refining A Blunt Instrument*

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I. Introduction

A decade ago, commentators characterized lump sum spousal support awards as "an uncertain subset of an uncertain area" of law.[1] Today, court ordered lump sum spousal support awards remain unpredictable. Few courts make lump sum spousal support awards; of those that do, few provide detailed analyses of how those awards are calculated or advance principles of general application. Comparisons between cases reveal a variety of calculation methods and results.

A review of recent jurisprudence highlights issues and trends for determining whether lump sum spousal support is suitable in a given case and factors that should be considered when calculating an appropriate award.

II. Legislation

Section 15.2(1) of the *Divorce Act*[2] provides:

> A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Various provinces have similarly worded statutory provisions that apply to married and common law spouses.[3]

The *Divorce Act* draws no distinction between lump sum and periodic spousal support, nor does its legislative history reveal any intention on the part of Parliament to impose any special restrictions on the use of lump sum spousal support.[4]

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[1] Trudi L. Brown, "Spousal Support" (BC CLE Family Law Conference – 2001, Vancouver, BC July 2001) at p. 1.1.01.
[2] R.S.C. 1985, c. 3 (2nd Supp.) ("*Divorce Act*").
[3] See e.g. *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(5); *Family Law Act*, S.A. 2003, c. F-4.5, s. 66(3); *Family Maintenance Act*, C.C.S.M. c. F20, s. 10(1); *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1); *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 3(1).
[4] *Davis v. Crawford*, 2011 ONCA 294 (CanLII) ("*Davis*") at paras. 54-58.

III. Lump Sum Spousal Support – A Court's Other Option

Despite the plain wording of the governing legislation, courts across Canada have historically treated periodic spousal support awards as the default position and lump sum spousal support as the exception to the rule.[5]

The stated reasons for this preference include:

1. the "difficulty of disentangling the economic lives of divorcing spouses";[6]
2. a desire to ensure that support orders are directed at providing recipients with proper maintenance, rather than effecting a property division;[7] and
3. a concern that positive or negative life changes could potentially occur for one or both of the spouses that would warrant a future variation of support.[8]

In *Davis v. Crawford*,[9] the Ontario Court of Appeal, sitting as a five-member panel, recently reconsidered the principles underlying lump sum spousal support and discussed in detail the factors that a court should consider when determining whether to order lump sum spousal support.

The issue in that case was whether the lower court had erred in awarding a 66-year old common-law spouse of 23 years $135,000 in lump sum spousal support pursuant to Ontario's *Family Law Act*. In deciding that the lump sum award was appropriate in the circumstances, the lower court was heavily influenced by the fact that the dependent spouse was under financial hardship and deprived of any claim for property division because the parties were unmarried. On appeal, the 64-year old payor argued that the lower court's decision was inconsistent with the Ontario Court of Appeal decision in *Mannarino*.[10] In that decision, the Ontario Court of Appeal held that "lump sum maintenance should be awarded only in very unusual circumstances, where there is a real risk that periodic payments would not be made."[11]

The payor husband also argued that the award was inconsistent with other widely accepted principles in the jurisprudence. Specifically, he argued that lump sum spousal support should not be awarded to effect a redistribution of property under the guise of support or where it would deprive the payor of the ability to apply for a variation.

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[5] See e.g. *Rockall v. Rockall*, 2010 ABCA 278 (CanLII) ("*Rockall*") at paras. 20 & 23; *Hauff v. Hauff* (1994), 95 Man. R. (2d) 83, 5 R.F.L. (4th) 419 (Man. C.A.) (CanLII) at p. 5; *Pettigrew v. Pettigrew*, 2006 NSCA 98 (CanLII) at para. 29; *Elliott v. Elliott* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.); *Mannarino v. Mannarino* (1992), 43 R.F.L. (3d) 309, [1992] O.J. No. 2730 (QL) ("*Mannarino*") (Ont. C.A.).

[6] See e.g. *Rockall*, supra note 5 at para. 23.

[7] See e.g. *Hrenyk v. Berden*, 2011 SKQB 305 (CanLII) at para. 149; *Mannarino*, *supra* note 5 at para. 2.

[8] See e.g. *Litzenberger v. Litzenberger*, 2012 SKQB 122 (CanLII) at paras. 78; *Mannarino*, *supra* note 5 at para. 2.

[9] *Davis*, *supra* note 4.

[10] *Mannarino*, *supra* note 5.

[11] *Ibid.* at para. 2.

The Ontario Court of Appeal made the following observations with respect to the balancing of considerations a trial court must undertake in deciding whether to structure a spousal support award as a lump sum:

> Most importantly, a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.
>
> The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example: short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.
>
> Similarly, the disadvantages of such an award can include: the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
>
> In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.[12]

The Ontario Court of Appeal endorsed the view that spousal support should not be made for the purpose of redistributing property; however the court recognized that a lump sum award can be made to relieve the financial hardship of a dependent spouse. The court ultimately concluded that all lump sum awards have the effect of transferring assets from one spouse to another, but the purpose needs to be distinguished from the effect.[13]

In dismissing the husband's appeal, the Ontario Court of Appeal rejected the view that lump sum spousal support should only be awarded where there is a real risk that a payor will not make periodic payments or limited to other very unusual circumstances. The court held that to the extent *Mannarino* has been interpreted that way, the interpretation is incorrect. The court nonetheless recognized that lump sum spousal support will be rarer than periodic support awards for practical reasons, such as:

1. many payors have an inability to make a lump sum payment;
2. married dependent spouses often have their need for transitional capital addressed by equalization of family property;
3. many cases involve situations where neither party's circumstances favour a lump sum support award; and

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[12] *Davis, supra* note 4 at paras. 66-69.
[13] *Ibid.* at paras. 60-62.

4. the potential for changed circumstances will outweigh factors favouring a lump sum award for many spouses.[14]

Both the trial judge and the Court of Appeal placed considerable reliance on the findings of credibility and lack of disclosure made against the payor husband in concluding that a lump sum award was appropriate in the circumstances.

At least one commentator has observed that *Davis* does not represent a drastic departure from past jurisprudence because *Mannarino* has always been restrictively interpreted.[15] However, *Davis* clearly represents a nuanced and positive framing of lump sum spousal support. Its thorough analysis may ultimately promote more widespread consideration and use of this remedy by courts.

Outside Ontario, at least two British Columbia Supreme Court judges have looked to *Davis* for guidance on the issue of when to award lump sum spousal support.[16]

IV. Reasons for Awarding Lump Sum Spousal Support

Courts most frequently award lump sum spousal support in situations where both spouses agree that it is the appropriate method of structuring the award. However, consensus among the parties is not a necessary prerequisite. In fact, a court can exercise its discretion to make a lump sum award even if such an award is not sought by either party.

In *Lace v. Gray*,[17] the Nova Scotia Court of Appeal, upheld an award of both lump sum and periodic support made pursuant to s. 3(1) of Nova Scotia's *Maintenance and Custody Act*, though neither party had made submissions about the appropriateness of a lump sum award before the trial judge. The Nova Scotia Court of Appeal held that the trial judge had not erred in exercising her discretion to award lump sum support because of the financial dependency of the recipient spouse; she had considerable debt accumulated during the relationship. The recipient spouse had applied for "spousal support" without specifying whether she was seeking lump sum or periodic support. The Nova Scotia Court of Appeal noted that it would have been preferable for the trial judge to seek submissions from counsel on this point.[18]

The Ontario Court of Appeal in *Davis* discussed the responsibility of counsel to assist the court in determining how to structure a spousal support award and the need for courts to provide clear explanations in their reasons for judgment:

> Irrespective of whether the proposed support is periodic or lump sum, it is incumbent upon counsel to provide the judge deciding the matter with submissions concerning the basis for awarding and the method of calculating the proposed support, together with a range of possible outcomes. Further, it is highly desirable that a judge making a lump

[14] *Ibid.* at paras. 70-74.
[15] See Philip M. Epstein, QC, "The Year in Review (2010)" (CLE BC Family Law Conference – 2011, Vancouver, BC July 2011) at p. 3.1.48.
[16] See *Robinson v. Robinson*, 2011 BCSC 1489 (CanLII) ("*Robinson*") at para. 96 (currently under appeal); *Brandl v. Rolston*, 2012 BSCS 902 (CanLII) at para. 84.
[17] 2009 NSCA 26 (CanLII).
[18] *Ibid.* at para. 19.

> sum award provide a clear explanation of both the basis for exercising the discretion to award lump sum support and the rationale for arriving at a particular figure. Clear presentations by counsel and explanations by trial judges will make such an award more transparent and enhance the appearance of justice. Over time, this approach will undoubtedly foster greater consistency and predictability in the result.[19]

The importance of clear reasons is illustrated by the Alberta Court of Appeal decision *Rockall v. Rockall*.[20] In *Rockall*, the Alberta Court of Appeal reversed a decision to award lump sum spousal support to a terminally ill spouse and converted the value of the lump sum award to periodic payments effectively because the trial judge's failure to give reasons for making the lump sum award was an error reviewable on appeal.[21]

While there is no exhaustive list of reasons why a court will exercise its discretion to award lump sum spousal support, such reasons include:

1. the payor spouse has a history of failing to pay either periodic child support or spousal support under an earlier order or agreement;
2. there is some indication that the payor's responsibility towards the recipient is dwindling over time and that he views the recipient's well-being as a lower priority than other financial or personal commitments;
3. the payor spouse has a history of deceitful conduct;
4. the payor spouse has an inability to pay periodic payments based on an income stream, but has available assets to make a lump sum payment;
5. the payor has the ability to make a lump sum payment without undermining his or her future self-sufficiency;
6. the payor is of advanced age;
7. the payor's livelihood seems precarious;
8. there is a risk that the payor will leave the jurisdiction;
9. the payor resides in a jurisdiction outside of Canada where periodic payments are not tax deductible;
10. the recipient needs lump sum support to compensate him or her for lost career opportunities;
11. the recipient has an immediate need for a lump sum to retrain or purchase a home;
12. the recipient needs to discharge a debt;
13. the recipient is under financial hardship that is not addressed by property division;
14. the recipient needs a nest-egg against the contingencies of life;

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[19] *Davis*, *supra* note 4 at para. 75.
[20] *Rockall*, *supra* note 5.
[21] *Ibid.* at paras. 26-34.

15. the recipient has established a new relationship;
16. the lump sum will enable the recipient to establish and maximize an independent income stream;
17. the parties' relationship was short in duration;
18. the parties' relationship is marked by high levels of ill will, conflict or poor communication, particularly with respect to financial issues;
19. the imposition of an obligation to pay periodic sums would create further conflict between the parties;
20. termination of personal contact between the parties is desirable;
21. the lump sum is for a retroactive award; and
22. the support award is based on compensation rather than on need, so future changes in circumstance are less likely to result in a variation and the uncertainty element is less of a concern.[22]

V. Determining the Award

Once a court decides that it is appropriate to award lump sum spousal support, the next challenge is determining the appropriate quantum.

The widespread use of the *Spousal Support Advisory Guidelines*[23] has brought more predictability and uniformity to periodic spousal support awards for payors and recipients who do not fall within the exceptions outlined in the *SSAG*. The same cannot be said for lump sum spousal support awards. In reviewing the case law, it is often difficult to understand how courts arrive at specific lump sum awards because explanations are frequently not provided.

The failure of litigants to provide courts with sufficient evidence and detailed submissions on quantum can result in awards that appear arbitrary for their lack of explanation.[24]

In *Davis*, the Ontario Court of Appeal observed that as a means of promoting consistency and predictability, counsel and courts should consider whether the amount awarded is consistent with the *SSAG*.[25] Where the award departs from the quantum of support prescribed by the *SSAG*,

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[22] *Carter v. Carter* (1978), 3 R.F.L. (2d) 355 (Nfld. T.D.) at para. 37; *Beck v. Beckett*, 2011 ONCA 559 (CanLII) at para. 12; *Rockall*, supra note 5 at para. 24; *Robinson*, *supra* note 16 at paras. 97-105; *Davis*, *supra* note 4 at paras. 62, 63 & 67; *Stace-Smith v. Lecompte*, 2011 BCCA 129 (CanLII) ("*Stace-Smith*") at para. 31; *S.F. v. G.F.*, 2009 BCSC 1760 (CanLII) at para. 41; *Vermeulen v Vermeulen*, 1999 CanLII 1543 (N.S.C.A.) at para. 13; *Beese v. Beese*, 2008 BCCA 396 (CanLII) ("*Beese*") at para. 64; *English v. English*, 2011 BCSC 90 (CanLII) ("*English*") at para. 50-52.

[23] Professor Carol Rogerson & Profressor Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008).

[24] See e.g. *Stace-Smith*, supra note 22 at paras. 32-33.

[25] *Davis*, *supra* note 4 at para. 76.

courts should provide some explanation as to why the *SSAG* do not provide an appropriate result.[26]

Some courts rely on computer generated models to calculate lump sum spousal support awards.[27] Other courts have shown reluctance to base lump sum awards on computer generated models, preferring to develop their own models based either on extrapolations from monthly *SSAG* figures or on their own sense of fairness.[28] The stated reasons for this include concerns that the discount rates or other assumptions built into the software lead to inappropriate results in the circumstances.[29]

VI. Theoretical Underpinnings of Award Determination

One view of lump sum spousal support is that it is merely a substitute for periodic support. From this perspective, the purpose of a lump sum award is to provide the support recipient with the same benefit that he or she would otherwise receive if the court made an award on a periodic basis and the payor fulfilled those obligations. In order to achieve this result, counsel and courts need to consider how lump sum spousal support differs from periodic spousal support and make adjustments so that the value to the recipient and the cost to the payor mirror as closely as possible the value of a periodic award. Factors to address include:

1. tax consequences;
2. present value discounting; and
3. future contingencies such as mortality, job loss, catastrophic life events, retirement, the termination of child support and the future financial prospects of the recipient spouse.

An alternative view is that lump sum spousal support is a unique bargain that allocates risk differently than periodic payments. From this perspective, the above noted factors may still be considered, but in a less formulaic fashion.

Where the amount of periodic support would otherwise be paid over a relatively short period, counsel and courts can be more confident that the lump sum award is merely a substitute for periodic spousal support. The longer the period of entitlement, the less reliable the substitute model becomes due to the potential for unforeseen changes.

Determining an appropriate award is not an exact science and the challenges of striking the right balance between various competing considerations should not be underestimated. Conversely, the challenges presented by the exercise should not eliminate its consideration.

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[26] *Ibid.*; see e.g. *Smith v. Smith*, 2006 BCSC 1655 (CanLII) at paras. 37-40; see e.g. *Foster v. Foster*, 2007 BCCA 83 (CanLII) ("*Foster*") at paras. 63-68.
[27] See e.g. *J.T.D. v. J.P.D.*, 2012 BCSC 343 at paras. 222 & 230; *English*, *supra* note 22 at paras. 54-55.
[28] See e.g. *Robinson*, *supra* note 16 at para. 128; *Hartshorne v. Hartshorne*, 2009 BCSC 698 (CanLII) ("*Hartshorne*") at paras. 130-135 (rev'd in part on other issues 2010 BCCA 327).
[29] See e.g. *Robinson*, *supra* note 16 at para. 121 & 128; *Hartshorne*, supra note 28 at paras. 130-135; and *Luehr v. Luehr*, 2011 BCSC 359 (CanLII) ("*Luehr*") at paras. 29-30.

VII. Tax Adjustments

Lump sum and periodic spousal support carry different tax consequences for Canadian taxpayers. Under the *Income Tax Act*, a payor spouse who pays periodic support pursuant to a written agreement or order is permitted to claim all of his spousal support payments as a deduction to his taxable income on his Canadian income tax return. Conversely, a recipient spouse must declare all of the spousal support received as taxable income on his or her Canadian income tax return. In contrast, lump sum payments are not tax deductible to the payor or taxable in the hands of the recipient.

Counsel should not assume that courts will automatically address the different tax treatment of lump sum and periodic awards. Many courts, including the British Columbia Court of Appeal, have simply multiplied the amount of monthly support prescribed by *SSAG* (or otherwise determined by the court) by the number of months that periodic support would be paid to arrive at a lump sum figure.[30] When this occurs, the recipient receives more and the payor pays more than would otherwise be achieved by periodic payments; however, the cases in question have tended to be ones that would have resulted in modest periodic awards of short duration.

There is generally no reason given for this approach, however, in some circumstances, courts deliberately opt not to adjust for tax consequences.[31] For example in *C.C. v. J.M,*[32] Herauf J. of the Saskatchewan Queen's Bench opted not to adjust for tax consequences to the payor because the lump sum award was being ordered due to the payor's history of non-compliance with periodic payments. The court concluded that since the lump sum payment was made necessary by the payor's conduct, he should bear the burden of the tax on the payment.[33] It is difficult to understand why a lump sum award should not be discounted for tax for this reason alone. If the lump sum is ordered solely for security, that should not affect its quantum.

Adjusting for tax consequences is complicated by the fact that the tax effect of a lump sum award is generally different for the payor and the recipient, depending upon their respective marginal tax rates. Consequently, courts and counsel typically need to strike a balance between the tax effects to the payor and the recipient.

Balancing the tax effects does not necessarily mean that the court will split the effects evenly. For example, in *Patton-Casse v. Casse,*[34] the payor and the recipient each argued that the court should calculate the award on their respective marginal rates. The court endorsed the view that where the marginal tax rates of the parties differ, the court should take a balanced approach, but decided that the midpoint figure from the DivorceMate calculation was inappropriate in that particular case because the award was retroactive and the lack of pre-judgment interest on the arrears favoured a tax adjustment that was closer to the effects experienced by the recipient spouse.[35]

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[30] See e.g. *Beese*, *supra* note 22, *Stace-Smith*, *supra* note 22, *Foster*, *supra* note 26.
[31] See e.g. *Kerman v. Kerman*, 2008 BCSC 852; *C.C. v. J.M.*, 2010 SKQB 79 (CanLII) ("*C.C.*") at paras. LIII-LV.
[32] *C.C.*, *supra* note 31.
[33] *Ibid.* at para. LIV.
[34] 2011 ONSC 6182 (CanLII).
[35] *Ibid.* at paras. 14-15.

In every case, counsel should understand the magnitude of the tax effect of a lump sum award to both the payor and the recipient, lead evidence on this point and make submissions to the court about how to adjust for the tax effects of a lump sum payment. Failing to do so can be a costly mistake. For example, in *Fuller v. Matthews*,[36] the payor husband applied to re-open the case because the court had failed to deduct tax from a lump sum award. The court refused to re-open the case because it had been open to the husband to tender evidence and make submissions on the tax consequences of a lump sum award at trial.[37]

VIII. Discounting

In addition to adjusting for tax consequences, some courts apply discounting to lump sum awards to account for present value discounting and/or future contingencies. It is important to remember that these types of discounting should only be applied to prospective awards. Retroactive awards do not involve the same pre-payment advantages to the recipient, nor are they fraught with the uncertainty of prospective awards.

When a recipient spouse receives a lump sum award for future support, he or she receives the added benefit of being able to invest and earn income on the lump sum and the payor loses the opportunity to do the same. In order to adjust for this, it may be appropriate to apply a present value discount rate to the lump sum. An appropriate present value discount rate should correspond to the interest that the recipient could reasonably expect to receive. The rate can also be inflation adjusted so that the real value of the award to the recipient and the real cost to the payor remain constant over time.

When considering what present value discount rate to apply, counsel must consider the conservative nature and purpose of a lump sum spousal support award. It is unreasonable to expect that a recipient spouse would invest lump sum spousal support in high risk, high yield investments. Applying too high of a present value discount rate unfairly erodes the benefit to a recipient spouse.

It is also useful to consider how lump sum payments are dealt with in other areas of law, such as personal injury litigation. For example, in British Columbia, s. 56 of the *Law and Equity Act*[38] authorizes the Chief Justice of the British Columbia Supreme Court to set the discount rate for future damages. The purpose of these statutory rates is to eliminate the need for expert evidence in every case.[39] Pursuant to the *Law and Equity Regulation*,[40] which was adopted pursuant to s. 56 of the *Law and Equity Act*, the Chief Justice fixes two discount rates – one for future earnings (currently 2.5%) and one for all of the future costs (currently 3.5%).[41]

In *Wilson v. Wilson*,[42] the British Columbia Court of Appeal ordered a lump sum spousal support award equal to 60 consecutive monthly payments at the discount rate used for the calculation of

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[36] 2007 BCSC 1099 (CanLII).
[37] *Ibid.* at para. 17.
[38] R.S.B.C. 1996, c. 253 ("*Law and Equity Act*").
[39] *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 SCR 315 (CanLII) at para. 5.
[40] B.C. Reg. 352/81 ("*Law and Equity Regulation*").
[41] *Ibid.* at s. 1; see also British Columbia Supreme Court PD-7, Practice Direction: Discount Rate pursuant to the *Law and Equity Act*.
[42] (1997), 27 R.F.L. (4th) 131 (B.C.C.A.) (CanLII).

future loss in personal injury cases.[43] Similarly, in *Luehr v. Luehr*, Barrow J. of the British Columbia Supreme Court modified the award suggested by DivorceMate calculations by applying a 2.5% discount rate to comply with the *Law and Equity Regulation*, rather than the 1.5% discount rate generated by the software.[44]

Courts may also discount for future contingencies to address the fact that the payor will be unable to apply to vary the lump sum award in the future, even if his financial situation drastically deteriorates due to health problems, job loss or other factors or the recipient's situation improves. A review of the case law on negative contingency discounting provides little guidance on how courts arrive at specific discount rates.

Several lower court decisions in Ontario have applied a formulaic method to discounting.

In *Sharpe v. Sharpe*,[45] Campbell J. of the Ontario Supreme Court determined that the recipient spouse should receive eight years of periodic support at $15,000 per year for a total of $120,000 based on an imputed income of approximately $55,000 to $60,000 to the payor. From this figure, the court deducted 30% for tax, 6% for present value discounting and 50% for negative contingencies. The court discounted sharply for negative contingencies to adjust for the recipient's potential for remarriage and the possibility that the payor (whose employment had been terminated) would be unable to obtain adequate employment.

In *Durakovic v. Durakovic*,[46] Scott J. of the Ontario Superior Court of Justice ordered a lump sum award based on a monthly figure of $3,500 per month over 28 months, but deducted 30% for tax, 3% for present value discounting and 25% for negative contingencies. The court noted that the 25% negative contingency discount rate was lower than other cases because the lump sum calculation was for only two years. This resulted in an award of $49,907.

In *Raymond v. Raymond*,[47] Hennessy J. of the Ontario Superior Court of Justice ordered lump sum spousal support of $268,800 based on 10 years of mid-range *SSAG* support of $2,240 per month (net of taxes), less 6% for present value discounting and 50% for future contingencies. This resulted in an award of $98,585. The court did not explain what future contingencies warranted a 50% discount rate.

In *Fountain v. Fountain*,[48] Lemon J. of the Ontario Superior Court of Justice based the award on 15 years of periodic support totaling $90,000, less 6% for present value discounting and 25% for negative contingencies, resulting in an award of $49,500. The stated reasons for negative contingency discounting in this case included the recipient's mortality and the possibility that the payor would be unable to pay support to the age of 65 years.

This formulaic approach has also been applied in at least one British Columbia Supreme Court decision. In *Robinson*,[49] Watchuk J. of the British Columbia Supreme Court ordered lump sum

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[43] *Ibid.* at para. 19.
[44] *Luehr*, *supra* note 29 at para. 29.
[45] 1997 CanLII 12236 (ON SC) at paras. 49-52.
[46] [2008] O.J. No. 3537 (ON SC) (QL) at paras. 106-107.
[47] (2008), 64 R.F.L. (6th) 160, 2008 CanLII 68138 (ON SC) (CanLII) at paras. 23-27.
[48] 2009 CanLII 56741 (ON SC) at paras. 46-50.
[49] *Robinson*, *supra* note 16 at paras. 121 & 128-131.

spousal support equal to nine and one-half years of monthly support at a mid-range *SSAG* figure of $6,000 per month. From this figure the court deducted 35% for taxes, 7% for present value discounting and 20% for contingencies (the payor had a history of heart attacks and stroke). This ultimately reduced the award from $684,000 to $330,000. In comparison, DivorceMate models suggested an award between $380,050 and $544,152. The difference can partially be attributed to differing present value discount rates. The court found that the present value discount rate of 1.6% applied by the DivorceMate software was too low. Arguably, the discount rate of 7% applied by the court was too high, particularly in light of British Columbia's *Law and Equity Regulation* and prevailing interest rates. The largest adjustment, however, was for contingencies. The DivorceMate software has a built in function that allows users to choose whether to adjust for a recipient's life expectancy, but does not specify other contingency discounting. It was unclear to the court what, if any, contingency discounting was built into the DivorceMate models.

IX. Actuarial Evidence

One way to address the arbitrariness of discounting is to retain an actuary or an economist to give an expert opinion. Few spousal support cases involve this sort of expert evidence. Those that do, serve as a useful reminder that the utility of such evidence to courts is largely based upon the quality of the instructions provided by counsel to the expert. If an expert is retained, counsel should take pains not to provide skewed instructions that will leave the court with the impression that the expert is a hired gun whose evidence is unreliable and unhelpful.[50]

Counsel should also ensure that the expert's opinion is responsive to the questions before the court. In *Pollitt v. Pollitt*,[51] Czurtin J. of the Ontario Superior Court of Justice invited the parties to tender actuarial evidence to assist the court in determining the appropriate amount of lump sum spousal support. The court instructed the parties on the non-exhaustive list of factors it needed considered:

1. the life expectancy of the recipient spouse;
2. the cessation of child support;
3. changes for the recipient spouse as she begins to receive CPP and withdraw from her RRSPs;
4. the age at which the recipient should be expected to encroach on her savings;
5. the circumstances of the payor – specifically his health and life expectancy and its impact on his earnings and whether he would need to encroach on his savings; and
6. the possibility of future variations as the payor's income and needs change.[52]

The court recommended the appointment of a joint expert, but the parties were ultimately unable to agree and instead each relied on the actuarial evidence of their respective actuaries. The two actuaries received drastically different instructions. The court found the wife's actuarial evidence to be of limited use because her actuary did not address the variables outlined by the court. The payor husband's actuary, in contrast, had considered a multitude of scenarios based on the variables set out by the court.

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[50] See e.g. *Hartshorne*, *supra* note 28 at paras. 149-150.
[51] *Pollitt v. Pollitt*, 2010 ONSC 1186 (CanLII).
[52] *Ibid.* at para. 4.

Pollitt was a high-stakes case that ultimately resulted in the recipient spouse receiving slightly more than $1 million in lump sum spousal support. It contains a very thorough analysis of the potentially numerous factors that can affect the calculation of a lump sum award, including the use and limitations of actuarial evidence. Not all cases will warrant the expense of expert actuarial evidence.

X. Conclusion

The following themes emerge from the case law:

1. The *Divorce Act* draws no distinction between lump sum and periodic support.
2. Lump sum awards are most frequently awarded in situations where both parties agree that this is the appropriate type of award, but consensus is not mandatory.
3. Counsel should not assume that, in the absence of argument to the contrary, periodic spousal support will be awarded. Counsel should make submissions about how a spousal support award should be structured.
4. There are practical reasons why periodic spousal support is more frequently awarded than lump sum spousal support.
5. When deciding whether to award lump sum or periodic support, courts need to weigh the respective advantages and disadvantages of making a lump sum award and counsel should make submissions that are targeted at this weighing.
6. Where the advantages outweigh the disadvantages of making a lump sum award, the court should provide an explanation why lump sum spousal support is appropriate. A failure to do so may result in the lump sum being converted to periodic payments on appeal.
7. There is no closed list of reasons why a spousal support order will be made as a lump sum. The reasons are case-specific. Common themes include a need for finality, a payor's ability to make a lump sum payment and a risk that the payor will not honour periodic support obligations.
8. A lump sum award should generally not be made for the purpose of effecting a property division, but if the lump sum is made for another reason, such as to alleviate the hardship of a recipient spouse, the fact that its effect is to cause a property division does not prevent the court from making the award.
9. When assisting courts to determine the appropriate quantum of lump sum spousal support, counsel should present submissions on *SSAG* ranges. If counsel wants the court to depart from the *SSAG* ranges, an explanation should be provided.
10. Counsel may put before the court computer generated models of lump sum support, but should not assume that the court will merely apply those models.
11. Counsel should tender evidence and make submissions on the differential tax treatment of lump sum and periodic awards for both the payor and the recipient. Failing to do so may result in this factor not being addressed. If representing a recipient, counsel should consider whether there are reasons a court should not make a tax adjustment, such as

circumstances where the award is being made only to combat the payor's past non-compliance with an order for periodic support.

12. If the award is for future support, counsel should consider whether it is appropriate to make submissions on present value discount rates and negative contingency discounting. Counsel should also consider whether it would be of assistance to the court to have expert evidence on these issues.

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3rd Annual "Bread and Butter" Issues in Family Law

The Mental Health Professional As Expert: Options And Ideas For Your Tougher Parenting Cases

Nicole Tellier
Barrister and Solicitor

Friday, September 21, 2012

Ontario Bar Association
Continuing Professional Development

THE MENTAL HEALTH PROFESSIONAL AS EXPERT:
OPTIONS AND IDEAS FOR YOUR TOUGHER PARENTING CASES
Nicole Tellier: September, 2012[1]

A. Overview

Family law matters involving parenting issues are the most emotionally and financially draining of all. Clients need to be told that. Some advocates believe that in a parenting case the object of the game is to focus on the other party's deficiencies as a parent or their character generally. Many a judge have commented on the viciousness with which parents wage these wars when rendering their Reasons. In some cases, a parent will give the opposite party ample ammunition. He or she may have a pattern of breaching court orders. He or she may have engaged in alienating behavior. He or she may have been violent to the other parent or to the child directly. He or she may have made false allegations that the other parent has physically or sexually abused the child. There are an alarming number of cases where one parent suffers from a personality or mood disorder. The pathology and the family dynamic continues and often worsens post-separation. In short, taking on a difficult parenting case is not for the faint of heart. In many ways, it is the most important work an advocate can do since the outcome affects the lives of children then and for many years to come.

The most successful strategy is keep the focus on the children, their needs or "best interests". Focus on how and why your client's proposed Parenting Plan meets those needs. The advocate must find the appropriate balance between compassion for a parent struggling with custody issues while maintaining objectivity and professionalism. More so than in financial cases, the outcome in parenting cases depends upon findings of credibility. Therefore, it is important that your client be open and frank with you about all of the facts that may be revealed in the course of the proceedings. It is always best to acknowledge and 'manage' facts unfavourable to your client's position rather than hope they will not emerge.

[1] The paper is a revision of a paper I authored and presented in March 2012, as part of the joint Advocates' Society/LSUC program "Conduct of a Family Law Trial".

What follows is a summary of the questions and strategies to keep in mind when working with a mental health professional in a parenting case. The aim is to acquaint you with the options, raise some issues and provide you with some useful resources. This paper does not purport to be an extensive or exhaustive examination of the subject.

B. Choosing the Best Approach for the Involvement of a Mental Health Professional

In Ontario, there are three options for involving a mental health professional in a parenting case. Section 112 of the *Courts of Justice Act* governs the manner in which the Children's Lawyer may become involved to cause an investigation to be made and report and make recommendations to the court. Interestingly the potential mandate goes beyond custody and access and includes the child's support and education. A court order appointing the Office of the Children's Lawyer is not mandatory. The OCL has the discretion to accept or decline the referral. This is perhaps the biggest disadvantage of this procedure. One may expend resources to bring a motion seeking the appointment of the OCL or indeed a judge may, on his or her own initiative, order the involvement of the OCL, but the decision about whether to become involved with the family or not is ultimately in their discretion.

Over the years I have formed the impression that where a family has substantial resources of their own, the OCL may decline to take on the case. The OCL provides services to thousands of children every year and has limited human resources to do its important work. If a family can afford to retain a private assessor, it may be a basis for them to decline taking on the case. The other disadvantage of this option is that the parties have less control over the process which is governed by internal policies and procedures. They have virtually no control over the identity of the person assigned to their case. All that being said, the Office of the Children's Lawyer has been providing families with assistance in their custody and access disputes for decades. At present, the Office of the Children's Lawyer has been vocal in its commitment to dialogue with the bench and bar. Lucy McSweeney, the Children's Lawyer, and Nancy Webb, the Provincial

Manager of Clinical Services, are both readily accessible by telephone should counsel have any individual issues or broader questions of policy to raise with that office.

A less known and less frequently used section of the *Court of Justice Act* is Section 105 which provides as follows:

Physical or mental examination
Definition
105.(1)In this section,

"health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction. R.S.O. 1990, c. C.43, s. 105 (1); 1998, c. 18, Sched. G, s. 48.

Order
(2)Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Idem
(3)Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

Further examinations
(4)The court may, on motion, order further physical or mental examinations.

Examiner may ask questions
(5)Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

In a situation where one party believes that the only problem is with the other party and not with themselves, the children, or the dynamic as a whole, this is a useful section to obtain a psychological or psychiatric assessment of the other party. The threshold that must be met to obtain such an order is set out in Section 105(2). Essentially, if either party puts the physical or mental condition of the other party into question, the court can consider the request for that person

to undergo a physical or mental examination by one or more health care practitioners. Your pleadings will need to amply identify the nature of the mental condition that is of concern, explain its relevance to the parenting issues and provide the court with a name of a duly qualified health professional to conduct the examination. Health practitioners are defined to include a registered psychologist or a member of the College of Psychologists of Ontario, which would include a psychiatrist. Note that in Section 105(6), if the health care practitioner asks questions of the party to be examined, they are compelled to answer them and their answers are admissible in evidence.

The most widely used approach is the one found at Section 30 of the *Children's Law Reform Act.* It is well established law that a court will only order a custody and access assessment where clinical issues present themselves.[2] These may manifest in the child, in one of the parents or in some sort of dysfunctional family dynamic. The parties can certainly agree to a custody and access assessment prior to the commencement of proceedings as part of a negotiation, but if the question of an assessment is to be litigated, this threshold must be established in the evidence supporting the request.

Even if there is agreement that an assessment is required and an order is going to be obtained on consent, the identity of the assessor may not be agreed to. Section 30(1) the *Children's Law Reform Act*[3] stipulates that:

> The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

[2] *Linton v. Clarke, 1994 CarswellOnt 361 (O.C.J. Gen Div)*
3 *Children's Law Reform Act*, R.S.O. 1990, c.C.12, s.30(1)

C. Choosing the Right Mental Health Professional

The assessor or examining health practitioner's formal credentials are relevant to the standards of practice he or she must employ. Like lawyers, these professionals are self-regulated and different guidelines and standards apply to each, namely social workers, psychologists and psychiatrists. While experience may be more important than the letters following the assessor's name, sometimes certain credentials are critical. Only clinical psychologists and psychiatrists are competent to diagnose a mental health disorder and, accordingly, if there is some suggestion that a child or one of the parents suffers from a mental health problem, prudence dictates selecting someone with these qualifications.

Regrettably there is a dearth of competent and readily available custody and access assessors province-wide and we tend to use the same ones repeatedly. When assisting your client in selecting the appropriate mental health professional to conduct the Section 30 assessment, you should have a good grip on the theory of the case and select someone who is appropriate for that. A review of any potential assessor's *curriculum vitae* is the obvious starting point. I always ask for the longer version to see in what areas the professional has presented or published. For example, if their main area of interest is adolescence, they may not necessarily be the best choice for a case with very young children. The others areas in which they provide clinical services are also worthy of consideration. Obviously, you will want to conduct an online search to check their profile and, in particular, to check all cases in which there is a reference to this expert. You may wish to check to see if he or she has a discipline history before his or her governing body. If your opposing counsel is suggesting someone you do not know, after obtaining the *c.v.* and doing the online research, you should ask the proposed assessor for the names of three lawyers who have used that expert in the past and contact them to seek feedback. You will want to know about the proposed expert's open-mindedness, their ability to communicate their findings and recommendations in written form and how they fared as a witness. Nothing short of due diligence is acceptable.

While it is trite law that the assessor cannot be asked the 'ultimate question' and his or her report and testimony is but one piece of evidence, in reality many judges place considerable weight upon what they view as the only objective evidence from a duly qualified professional. If you feel strongly about the identity of an assessor, it may be worth your while to argue such a motion. If you are not convinced yourself that this particular assessor is the best suited for this family and for these children, you are going to have trouble persuading the motions judge. There may be considerations unrelated to qualifications, such as cost and availability. While these are important considerations, if there is no urgency, it might be best to wait for the person you think is most suitable. Similarly, it is better to spend more for a more experienced assessor on the theory that he or she is more likely to 'get it right', enhancing the possibility of a consensual resolution and thereby increasing the chance of avoiding the cost and acrimony of a trial.

D. Preparing Your Client for the Assessment Process

There are no doubt whole papers on how to prepare your client for his or her participation in an assessment. Indeed, some mental health professionals offer 'coaching' services to litigants involved in an assessment. My own practice is to try to select the best person for the particular case. I try to work cooperatively with opposing counsel to agree on what the assessor should be provided in the way of pleadings or background material. I advise my clients to be forthright, open and honest. I advise them to be focused on the children and to openly acknowledge the strengths and weaknesses of the other parent as well as their own strengths and weaknesses as a parent.

I try to help the client focus on what he or she perceives the major problems to be and have well considered proposed solutions for decision making, for a residential schedule, for communication between the parents and the parents and their children and future dispute resolution. I encourage them to be proactive in the intake process. I frequently recommend they attend the first meeting with directions prepared by me, executed by them, authorizing the release of various records and the authority to speak with educators and health care providers. I ask them to provide a list of all

of the important people in the children's lives, such as their teachers, health care providers, coaches and the like. I ask them to provide a list of such collateral persons and family members whom they believe have important information the assessor might wish to access, along with contact information.

Before advising clients to cooperate by executing directions for the release of information, it is important to explain to them their rights in relation to health care records, including counseling records. While all relevant documents are presumptively admissible, in the case of health records, the court is directed to engage in a balancing test between the probative value of the records in question and the privacy rights of your client. The approach to these determinations is set out in the *Ryan* case in the SCC.[4] It is a must read whenever you consider the production of your client's health care records (broadly defined) or seek production from the opposing party. The court can review the entire record and make its own redactions to create the admissible version. This analysis for health records has been extended to include journals and diaries.[5]

In parenting cases, I usually obtain directions from clients for the records of their counselors, therapists or other health care providers at the outset of the case so that I can review and, if appropriate, vet these records prior to them being provided to an assessor or the court. It is better to know what is in these records in advance and it is certainly wise to vet them for irrelevant portions, or for references to issues for which you wish to assert privilege. I am vigilant about protecting the privacy of my clients when it comes to these records and encourage you to be as well.

Many very experienced health care providers do not fully appreciate the law of privilege as it relates to the health records they have generated. A client wishing to be open and cooperative may sign a direction allowing the assessor to obtain all of this information. It then forms part of his or her report and then any basis for objection at trial may deem to have been waived. Since

4 *M.(A.) v. Ryan 1997 CarswellBC 99 (SCC)*
5 *V. (K.L.) v. R.(D.G.) 1993 CarswellBC 2706 (BCCA)*

assessments ought not to be ordered unless there is a clinical issue, there is a strong likelihood there are counseling or medical records that will be of interest to the assessor and the adjudicator.

Third party records of this type take a long time to obtain. Sometimes health care practitioners and educators are unaware that they have an obligation to provide this information to your client.[6] The last thing one needs is to agree to a custody and access assessment only to have it delayed by many months while there is wrangling over obtaining and using this kind of documentation. This is, in part, why I say preparing for trial commences at the outset of any case. My intake form asks clients to disclose which mental health professionals they have seen over the course of their lifetime and in particular any they have seen who may have information bearing on the dispute between the parties. I ask for their permission to obtain these records in their entirety. Once we obtain them, we review them and make any decisions about production, in whole or in part, to the assessor or the court.[7]

This exercise needs to take place early on to ensure the assessor has what he or she needs so the report can be completed within the time frame prescribed by the *Family Law Rules*.[8] Rule 23 states:

> EXPERT WITNESS REPORTS
>
> (23) A party who wants to call an expert witness at trial shall serve on all other parties a report signed by the expert and containing the information listed in subrule (25),
>
> (a) at least 90 days before the start of the trial; or
>
> (b) in the case of a child protection case, at least 30 days before the start of the trial. O. Reg. 6/10, s. 8 (4).
>
> SAME, RESPONSE

6 The right of a parent to make inquiries and be given information regarding the health, education or welfare of a child is the same whether the parent has custody or access. See Section 20.5 of the *CLRA*.

7 Consider the child's privacy interest in his or her health records as well and whether the child's consent is appropriate or required.

8 *Family Law Rules, O Reg 114/99*

(24) A party who wants to call an expert witness at trial to respond to the expert witness of another party shall serve on all other parties a report signed by the expert and containing the information listed in subrule (25),

(a) at least 60 days before the start of the trial; or

(b) in the case of a child protection case, at least 14 days before the start of the trial. O. Reg. 6/10, s. 8 (4).

Rule 21 states:

21. When the Children's Lawyer investigates and reports on custody of or access to a child under section 112 of the *Courts of Justice Act*,

(a) the Children's Lawyer shall first serve notice on the parties and file it;

(b) the parties shall, from the time they are served with the notice, serve the Children's Lawyer with every document in the case that involves the child's custody, access, support, health or education, as if the Children's Lawyer were a party in the case;

(c) the Children's Lawyer has the same rights as a party to document disclosure (rule 19) and questioning witnesses (rule 20) about any matter involving the child's custody, access, support, health or education;

(d) within 90 days after serving the notice under clause (a), the Children's Lawyer shall serve a report on the parties and file it;

(e) within 30 days after being served with the report, a party may serve and file a statement disputing anything in it; and

(f) the trial shall not be held and the court shall not make a final order in the case until the 30 days referred to in clause (e) expire or the parties file a statement giving up their right to that time.

E. The Duty of the Mental Health Professional: Neutrality and Pre-Trial Disclosure

Neutrality

The seminal case on an expert=s duty to the court is *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd (AThe Ikarian Reefer@),* [1993] 2 Llod=s Rep 68 (Q.B.D.) (Commercial Court). The *Ikarian Reefer* sets out the duties and responsibilities of expert witnesses as follows:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form and content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
2. If an expert=s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, the qualification should be stated in the report.
3. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side=s expert=s report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
4. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

The duty of the expert has now been codified in the *Family Law Rules* at Rule 20.1, as follows:

DUTY OF EXPERT

20.1 (1) It is the duty of every expert who provides evidence in relation to a case under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 383/11, s. 6.

DUTY PREVAILS

(2) In the case of an expert engaged by or on behalf of a party, the duty in subrule (1) prevails over any obligation owed by the expert to that party. O. Reg. 383/11, s. 6.

COURT APPOINTED EXPERTS

(3) 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. 383/11, s. 6.

EXPERT TO BE NAMED

(4) An order under subrule (3) appointing an expert shall name the expert and, where possible, the expert shall be a person agreed on by the parties. O. Reg. 383/11, s. 6.

INSTRUCTIONS

(5) An order under subrule (3) appointing an expert shall contain the instructions to be given to the expert, and the court may make any further orders that it considers necessary to enable the expert to carry out the instructions. O. Reg. 383/11, s. 6.

FEES AND EXPENSES

(6) The court shall require the parties to pay the fees and expenses of an expert appointed under subrule (3), and shall specify the proportions or amounts of the fees and expenses that each party is required to pay. O. Reg. 383/11, s. 6.

SECURITY

(7) If a motion by a party for the appointment of an expert under subrule (3) is opposed, the court may, as a condition of making the appointment, require the party seeking the appointment to give such security for the expert's fees and expenses as is just. O. Reg. 383/11, s. 6.

SERIOUS FINANCIAL HARDSHIP

(8) The court may relieve a party from responsibility for payment of any of the expert's fees and expenses, if the court is satisfied that payment would cause serious financial hardship to the party. O. Reg. 383/11, s. 6.

REPORT

(9) The expert shall prepare a report of the results of his or her inquiry, and shall,

(a) file the report with the clerk of the court; and

(b) provide a copy of the report to each of the parties. O. Reg. 383/11, s. 6.

CONTENT OF REPORT

(10) A report provided by an expert shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications, including his or her employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 20.1) signed by the expert.

ADMISSIBILITY

(11) The expert's report is admissible in evidence in the case. O. Reg. 383/11, s. 6.

CROSS-EXAMINATION

(12) Any party may cross-examine the expert at the trial. O. Reg. 383/11, s. 6.

NON-APPLICATION

(13) For greater certainty, subrules (3) to (12) do not apply in respect of,

(a) appointments of persons by the court under subsection 54 (1.2) of the *Child and Family Services Act* or subsection 30 (1) of the *Children's Law Reform Act*; or

(b) requests by the court that the Children's Lawyer act under subsection 112 (1) of the *Courts of Justice Act*. O. Reg. 383/11, s. 6.

Rule 20.1(10) stipulates the content of an expert report. Note that Rule 20.1(10)7 specifically requires the expert to acknowledge, in writing, his or her duties pursuant to Form 20.1 and, in particular, the duty:

1. to provide opinion evidence that is fair, objective and non-partisan;

2. to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

3. to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Pre-Trial Disclosure: The Disclosure Meeting

Many assessors have adopted a practice of providing their findings and recommendations orally to the parties in the presence of their counsel prior to releasing their report. One reason may be their belief there is an ethical obligation to explain to the parents any findings from psychological testing and their recommendations. Others may do so in the hope that the release of verbal feedback and a summary of the recommendations will result in settlement and withhold releasing a comprehensive written report only if the parties, having received this initial disclosure, do not reach settlement. While this practice saves resources and avoids having the parties read unfavourable comments made by the other parent or the assessor, if there is a subsequent variation, the full report is unavailable to assist. In the case of the OCL, if an order has been made to investigate and report, then a full report must ultimately be filed with the court.

My advice as an advocate is to refuse to participate in separate disclosure meetings with each parent and his or her counsel. However, there may be times when it is either impractical or inappropriate to do so. Second, the rules regarding what is said at the verbal disclosure meeting need to be established before it takes place to avoid subsequent objections should reference to this meeting find its way into letters, affidavits or cross-examination.

Pre-Trial Disclosure: Obtaining the Assessor's or OCL's File

Parties are entitled to the entire file of the OCL investigator or Section 30 assessor.[9] This includes his or her notes and any psychological tests that he or she has done or delegated. To avoid any dispute or delay, confirm this in the engagement arrangements with the expert at the outset. These notes, if legible, will invariably contain important information about methodology, factual findings, children's wishes, psychometric testing and indeed impressions.

9 *Copeland v. Perreault, 2006 CarswellOnt 9305 (O.C.J.)*

A surprising number of custody and access reports do not specifically state how many hours the assessor spent with each parent and the child and in what location. This may be gleaned from the notes. You should be able to discern whether the same amount of time was spent with each of the parents or the parents and the child(ren) interacting. The notes will reveal whether the information from collateral witnesses was received by way of telephone call or an in-person consultation. The file will reveal whether the assessor ignored some proposed collaterals altogether and whether the directions executed by the parties to obtain information were acted upon. You may indirectly receive clinical notes and records of the opposing party which were provided to the assessor. Some assessors mark notations or asterisk's beside comments made by them; this can alert you to what may be important to them. Other assessors may pose questions to themselves or make comments in relation to their impressions at points in time. As soon as the report is released, you should ask for its author's complete file and there should be no resistance to obtaining it. Review it immediately upon receipt as it may give rise to the need for some other pre-trial motion.

F. Opinion Evidence on an Interim Motion and Pre-Trial Questioning

Expert reports are intended to be used at trial. Indeed, the recommendations therein relate to triable issues. Nonetheless, there are rare circumstances where it may be appropriate to rely upon an assessment report in support of an interim motion to change the *status quo.* It may also be appropriate to seek to question the assessor of a Section 30 assessment or an OCL report, either in support of such a motion, or in preparation for trial. In the oft-quoted case of *Genovesi*[10], Granger J. ruled that:

> Although the wording of s. 30 of the *CLRA* appears to be directed towards the use of the report at trial, as opposed to interim motions, it would seem to me that in exceptional circumstances, the report could be used on an interim motion. It must be remembered that the criteria for awarding interim custody differs to some extent from the principles of granting a final order of custody. An assessment report is usually ordered for use at a trial

[10] *Genovesi v. Genovesi, 1992 CarswellOnt 268 (OCJ Gen Div.)*

as opposed to being used at an interim proceeding. In rare cases the information obtained by the assessor might require immediate scrutiny by a judge to determine if there should be some variation of the existing custody arrangement.

The general rule is that the opinion and conclusions may not be relied upon when they have not been subjected to cross-examination, but the objective evidence contained therein may be relied upon.

Rule 20 of the *Family Law Rules* governs the circumstances under which a non-party may be questioned; this Rule applies to experts.[11] The Rule contains three conjunctive requirements which must be satisfied before the court should order the questioning. There are only a handful of cases which consider Rule 20(5) and of those, only a few deal specifically with the questioning of a mental health expert in the context of an OCL or assessment report. They all stand for the proposition that an order for questioning of a non-party should not be liberally permitted; it should be ordered as a last resort.

The case of *Boisvert* provides an interesting analysis of what is meant by the third requirement under Rule 20(5) regarding undue expense.[12] The court compares the Civil Rule 31.10 to Rule 20.5. It notes a gap in the *Family Law Rules* in relation to the requirement that the person seeking to question the non-party has to pay for all the transcripts in the Civil Rules. Applying the rule by analogy, the court imposes this as part of its order. The court also goes on to explain that the concept of "undue expense" is not limited to the expense of the parties. This branch of the three-part test should be used to defend a motion for the cross-examination of the author of an OCL report. The OCL has limited resources and to permit their questioning prior to trial contravenes this aspect of the Rule.

11 *Family Law Rules*, O.Reg. 114/99
12 *Boisvert v. Boisvert, 2006 Carswell 4532 (S.C.J.)*

In *Copeland v. Perrault,* Murray J. provides the most thorough analysis of the Rule as it relates to both the production of an assessor's file as well as when a questioning should take place.[13] In sum, if the report suggests there is a current or imminent harm to the child that might justify a change in custody prior to trial, then the court is likely to order the questioning of the assessor prior to hearing the motion.[14]

The Rule regarding reading in from a transcript at trial applies to the parties but may also apply to the questioning of an expert. See Rules 23(13) and 23(14). The transcript of an expert may be read in at trial, without leave of the court.

G. Preparing for the Expert Evidence at Trial

Unlike the case of financial experts, there is rarely an opportunity for you to meet with the expert on your own in advance of the hearing. The OCL will usually conduct a disclosure meeting with the parties and their counsel. At that time they provide a summary of their findings and recommendations. An OCL report pursuant to section 112 of the *Courts of Justice Act* is the product of a fact finding investigation.[15] Although the report contains recommendations based on facts as found by the investigator, the author of the report is not technically mandated to provide opinion evidence. Upon receipt of the OCL report a parent may file a Notice of Objection and must do so promptly.[16]

Since there is no property in a witness and the expert is not retained by one person or the other, it is open to either parent to ask to meet with a Section 30 assessor alone to prepare him or her for trial.

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[13] *Copeland v. Perreault, 2006 CarswellOnt 9305 (O.C.J.)*
[14] See also:
Abrego v. Moniz, 2006 CarswellOnt 8378 (O.C.J)
Burka v. Burka, 2003 CarswellSask 633 (SKQB)
Forte v. Forte, 2004 CarswellOnt 1461 (S.C.J.)
Ingles v. Watt, 2000 CarswellOnt 4281 (S.C.J.)
Medvis v. Peters, 2002 CarswellOnt 1241 (O.M.)
15 *Courts of Justice Act, RSQ, c T-16*
[16] *Family Law Rules, Rule 21(e)*

Some experts decline the invitation on the theory that to do otherwise compromises their neutrality. Others are willing to meet with the parent whose claims they ostensibly support in terms of their recommendations, to the exclusion of the other parent. It is certainly worth the try. In most instances, the author of the Section 30 assessment report will not speak to you prior to trial in the absence of opposing counsel. This leaves you with the challenge of preparing questions without the benefit of that preparation.

The questioning of a mental health professional in this context then is quite different from that of your own expert. First, as mentioned above, it is unlikely you will have an opportunity to prepare him or her in advance of trial. Second, since he or she is really an expert of the court, both parties have a right to cross-examination. Rule 20.1(12) specifically provides that *any* [emphasis added] party may cross-examine the expert at trial. If the expert makes a recommendation adverse to your client's position and interests, you will surely wish to cross-examine. On the other hand, if the expert supports your client's position, then you may wish to use both open-ended, examination-in-chief type questions as well as questions for cross-examination.

In the case of an OCL report, you are required to file the Notice of Objection if you take issue with it. In the case of a Section 30 assessment, you may decide not to inform the assessor, in advance, that you challenge his or her findings of fact. As a strategy, you may believe you will be able to marshal evidence from your client or others which will be accepted by the judge, that is at direct odds with an important fact or facts relied upon by the expert to reach his or her conclusions. Virtually every expert report includes the *caveat* that if the facts upon which the author relies are proven untrue then so too may the conclusions and recommendations.

I plan my questions of a Section 30 assessor under five different areas, namely: qualifications, methodology, findings of fact or factual assumptions, the overall theory of the case and recommendations. In all areas, keep your questions short and use simple language. Put one proposition or a single fact sentence to the witness at a time. Do not be sarcastic or argumentative. A soft, steady, albeit strong, approach works best.

1. *Qualifications*

If the expert was jointly retained based on his or her qualifications, it may seem like a pointless exercise to go through those qualifications in any detail. In fact, highlighting the qualifications and indeed establishing areas of expertise are a critical part of the testimony to be elicited. This also gives you a warm-up of the witness, which is a helpful approach to any witness. There are a number of things worthy of highlighting and drawing to the trier of fact's attention regarding qualifications. The formal credentials may be important to establishing the assessor's ability to diagnose psychopathology. You may also wish to focus on the author's credentials as it relates to his or her thesis topic or degree granting institution. Some universities have more demanding admission requirements or more status than others and without asking the adjudicator to do so, he or she will effectively take judicial notice of this fact. If the author's *c.v.* is lean on publications, then his or her academic credentials may need to be highlighted to compensate. Individual achievements such as graduating with distinction or being the recipient of a scholarship is certainly worthy of a ten-second question and answer. If the expert has achieved excellence or is outstanding in some way, you want the judge to know that.

It may be that you have a particular theory about the case for which it would be helpful to establish the assessor has a related expertise. For example, in a parental alienation case I did, the assessor was not engaged because of his or her expertise in that area. When he was first retained, no one understood it to be an alienation case. Indeed, his report did not incorporate any such analysis. Many months later, by the time the case went to trial, the alienation was full-blown and three of the four children no longer had a relationship with their mother, with whom they previously enjoyed a close and healthy bond. The author of that report was indeed quite conversant with parental alienation theory. Through only a few questions, I was able to establish him as an expert in parental alienation without objection from opposing counsel. I was then able to put the 8 *indicia* of paternal alienation to him. I put to him a series of hypothetical facts (ones I had already established earlier in the trial) to suggest each of the 8 criteria had been met. This led him, and

ultimately the judge, to the conclusion the father was an alienator, even though the assessor's 18 month old report did not say so.

In that same case, I tendered expert evidence to support the mother's spousal support claim. We argued that she was currently unemployable as a direct result of the trauma caused by the father's and the children's conduct towards her. In qualifying the expert, I established her expertise in Post-Traumatic Stress Disorder (PTSD) since over 50% of her patients present with that kind of problem. While a clinical psychologist or psychiatrist is competent to diagnose PTSD, asking this psychologist about the percentage of her patients who suffer from trauma and highlighting her academic work in that area allowed me to qualify her as an expert in PTSD, thereby strengthening the conclusions in her report that related to my client's inability to work on the basis of that particular diagnosis.

Other times, one may wish to contain the areas of expertise the assessor/expert witness has. For example, you may wish to get the expert to admit he or she does not have expertise in high conflict cases as they represent less than 10% of his or her therapeutic work or litigation support work. Be wary of putting these negative propositions to the expert in case you are surprised to discover he or she claims to have the very expertise you are hoping to rule out.

Whomever you are acting for, the qualification exercise can and should be done by leading questions, peppered with open-ended questions to allow the expert to elaborate in important areas relating to his or her formal credentials, academic achievements, research projects and publications or clinical experience. For example, one could ask,

> Q: I understand you achieved your Master's Degree in 1995 from John Hopkins University?
>
> A: Yes, that's correct.

Or one could ask:

> Q: Where and when did you complete your graduate work?

A: I graduated *suma cum lade* from John Hopkins University in 1995. I was very fortunate to have been awarded a scholarship.

The latter approach is more likely to be heard and noted by the judge.

2. *Methodology*

The quality of the written reports I have read over the years and what they tell me about the author's methodology ranges widely. I have read reports which clearly have "cut and paste" sections that are used in all the author's reports. In one such instance, the "cut and paste" section even included another child's name. To preempt any potential attack based on bias, a report ought to set out the time spent with each of the parents, the parents with their children, and the times spent seeing the child(ren) alone. It should note the time spent with collateral participants to the process, either contacted at the initiative of the assessor or at the request of one of the parents. The times spent with the child and each of his or her parents should be for the same period of time in a similar fashion. Either all the interviews and observations will have taken place at the assessors' office or, as with most assessors, a home visit will also occur. Some assessors make sure that the child is seen right after being parented each parent, assuming mother and father are the custody contenders. This is a sound methodology. In other words, the time spent, the setting and the context must be even-handed or the assessor will be subject to easy attack. It is surprising how often this does not occur.

Depending on the cultural or religious background of the parents, the assessor's approach may be methodologically deficient insofar as it lacks appropriate cultural sensitivity. It is unlikely that methodological deficiencies are sufficient, on their own, to challenge an assessor's recommendations but part of the art of a successful cross-examination is to chip away, piece by piece, at each part of the report to cast doubt in the trier of fact's mind about its integrity as a whole. It is rare that an assessment report will be so obviously wrong or that you will be able to 'trap' the assessor/witness in a way that reveals a single fatal flaw. It is more likely a successful

challenge will be built upon a compilation of questions you raise in each of the five areas mentioned.

There are several resources which can assist you in determining whether the assessment report you have meets acceptable standards. These standards are not codified in any specific way. Two companion texts are essential to any family law lawyer whose work entails resolving or, if necessary, litigating parenting cases. They are: "Child Custody Assessments" and "Challenging Issues in Child Custody Disputes".[17]

3. *Findings of Fact or Factual Assumptions*

Most Section 30 assessments include an historical background regarding the parties' family of origin, their relationship and significant facts in dispute. It is quite common to read whole paragraphs about the mother's or the father's view of the problems in the relationship or the problems that each perceives the other to have as a parent. As such, there are large sections of an assessment report that essentially paraphrase what each of the parents has reported to the assessor. Sometimes the assessor merely reports these summaries without comment. Where the parties present different versions of a significant issue or event the assessor is likely to comment about his or her own impressions or conclusions in that regard.

In some cases, significant facts are verifiable from third parties. For example, a parent may complain that the other parent regularly fails to get the child to school on time or is inattentive to homework. Whether or not this statement is accurate or exaggerated can easily be verified by obtaining the child's attendance record and report cards. In an arbitration I participated in, the child's daycare attendance record became an issue and, as it turned out, the daycare recording the absences had made some errors. Other absences were easily explained. The father claimed that the stay-at-home mother should take the child to daycare on a consistent basis and to do otherwise

17 Birnbaum, R., Fidler, B. & Kavassalis, K, 2008, *Child Custody Assessments – A Resource Guide for Legal and Mental Health Professional*, (Thomson Canada Limited) and Fidler, B., Bala, N., Birnhaum, R. and Kavassalis, K, 2008, *Challenging Issues in Child Custody Disputes*, Thomson Canada Limited

was disruptive to the child's routines. He claimed mother frequently did not bother to take the child to daycare. To prove his point, he procured a letter from the daycare listing the child's absences over the course of the previous year. The letter was inadmissible hearsay but because we knew the daycare had made some errors, and we could not afford to call a witness from the daycare, we did not object to it going in. We were able to compare the dates of absence notes in the daycare records with the child's attendances at the doctor, as well as the parents' vacation schedule. In the final analysis, the father had to admit on cross-examination, that all of the child's absences from the daycare were in fact reasonable and explicable.

In a similar fact situation, if an assessor had simply accepted one parent's complaint at face value, he or she may have recommended against mid-week visits by one parent to avoid tardiness or incomplete homework. If you can show, through collateral documentation, that a factual assumption is wrong, then the corresponding recommendation can also be shown to be inappropriate. If an assessor does not take the time to check these easily verifiable facts, then you must do so. If it turns out that the assessor's factual assumptions are incorrect, then you can put the correct facts to him or her and they may be of sufficient import to challenge some of the recommendations.

In another case of mine, the mother informed the assessor that while she was out of the country pursuing her education she visited her children regularly, including monthly, all holiday weekends, all holidays, birthdays and the like. The assessor accepted this at face value. We knew her account of her contact with her children was grossly exaggerated. Through a grueling examination of her telephone records and credit card statements, we were able to establish her whereabouts at all times. By putting these documents to mother in cross-examination, we demonstrated she exaggerated the amount of time she spent with her children. The point is, if the assessor is not willing or able to do the work to verify facts, this becomes your job. And if the factual foundation of a report can be challenged, frequently the entire recommendations contained in the report are open to question.

One of the challenges of a trial is that even with the greatest of preparation, how the evidence unfolds is often difficult to predict. Facts may be revealed that are very favourable to you that you did not anticipate or, as in the example above, you may expect to prove a different set of facts than those relied upon by the assessor. For this reason, I try to insist at the Trial Management Conference that the assessor testify last. I think this provides for a more fair hearing since only the judge has the ability to make ultimate findings of fact. Rather than listening to an assessor provide recommendations based on a set of facts that have yet to be tested by the questioning of a series of witnesses and cross-examinations, it is preferable for the judge to have heard all of the testimony from the parties and the collateral witnesses before hearing from the assessor. By the time the assessor takes the stand, the factual foundation for the assessment report may well have already been shattered or supported, as the case may be. Further, since the Section 30 assessor is really the court's witness, it makes sense to have him or her testify last.

4. *Overall Theory of the Case*

Knowing the theory of your case, marshaling the facts accordingly and having the law to support it is the basic stuff of presenting a cohesive case for the adjudicator. With virtually every witness, you will wish to elicit facts that support your theory of the case. This can be done chronologically, thematically or a combination of the two. It is important to select which is the most effective way to elicit this evidence for each issue.

It is likely that the assessor has approached his or her task with a theory as well. In a mobility case, the focus will be whether or not meaningful contact can be maintained in the face of a residential shift. Where there is high conflict, a whole series of recommendations may be aimed at protecting the child from ongoing parental conflict. Or the conflict may be more manufactured by one party than real and hence the imposition of a joint custody regime may actually be appropriate. An assessor may believe that every parent has an equal right and responsibility to make decisions about their child but, in the face of high conflict, may feel compelled to recommend a parallel parenting or multi-directional order. The overarching theory may be one of

parental alienation. It may be theories of attachment inform the assessor's recommendations. It is important to be conversant with all of the social science literature and theories that pertain to your case.

Along with a membership to the Association of Family & Conciliation Courts (AFCC) comes a subscription to the *Family Court Review Journal*. This Journal contains numerous helpful articles on a variety of subjects relating to arrangements and decisions affecting children. So consider this a plug for joining the AFCC, if only to receive that literature. I hasten to add that I am a regular attendee at AFCC conferences and I have never been to one at which I did not attend a seminar that provided me with useful tips on how to approach the cross-examination of a mental health expert. For example, I heard a presentation by a psychiatrist describing the cognitive development of children and how an assessor must approach the question of his or her wishes differently having regard to their age and cognitive development. At the time, I had a contested parenting case involving five children whose ages ranged widely. If the matter did not settle, the presentation provided me with ideas to question the assessor about the appropriateness of her approach to the issue of the children's views and preferences.

It is important to put to the assessor your alternative theory. A thorough report should actually address alternative theories and explain why they do not apply. For example, an assessor may conclude that a primary caregiver is alienating and therefore, there should be a switch of the primary care of the child. In fact, the reason why the child may be reluctant to see the other parent is because that parent may have been emotionally or physically unavailable to the child in the past and there is an attachment problem. Perhaps the real reason for the unwillingness of the child to go may not be the fault of the primary caregiver but rather the child's own emotional insecurity surrounding his or her relationship with the other parent. The alternative theory needs to be explored in detail.

The evidentiary rule regarding the use of authoritative texts or literature is a most useful tool in challenging a mental health expert. An expert often refers to authoritative literature in support of

his or her opinion and any portion of those texts upon which the expert relies is admissible into evidence. Once such texts are referred to, it is open to counsel to read extracts to the expert and obtain his or her opinion of them. This way the written view of the author becomes the opinion of the witness.

Such literature and learned treatises may also be put to the expert in cross-examination to confront him or her with an authoritative opinion that contradicts the views expressed by the expert on the stand. As a condition precedent to this line of inquiry, the witness must recognize the author as authoritative. Once the expert accepts the text as authoritative, then extracts from it can be put to him and an explanation asked regarding differences between his opinion and those stated by the expert. For a useful summary of this rule, read the chapter on opinion evidence in *Sopinka*.[18]

5. *Recommendations*

Assessor's recommendations also vary widely. Some are prone to have pages and pages of recommendations, many of which appear to be a cut and paste job with standard clauses relating to a residential schedule for the parents. Sometimes this level of micro-managing birthdays, mother's days and father's days is not necessary and indeed, is a bit of an insult to the parents if those are not the real issues between them. Alternatively, some assessors provide broad recommendations where more particularity is appropriate having regard to the level of conflict between the parties.

The most successful way to challenge the recommendations are to challenge the factual assumptions underlying them. Sometimes recommendations will fail because the assessor has been inattentive to their practicality. They simply may not work having regard to the parties' work schedules. Or perhaps community resources are unavailable and if some kind of therapeutic intervention or supervised access is being recommended in a community where it is simply

18 Alan W. Bryant, Sidney N. Lederman, Michell K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (Lexis Nexis Canada 2009)

unavailable, then the recommendation must fail. Be careful in your cross-examination in this section of the report as it could easily give the assessor an opportunity to bolster his or her recommendations.

H. CRITIQUE ASSESSMENTS

R. v. Mohan sets out the criteria for the admission of expert evidence as follows:[19]

1. the evidence must be relevant to a fact in issue;
2. the evidence must be *necessary* [emphasis added] to assist the trier of fact;
3. the evidence cannot infringe the exclusionary rule; and
4. the witness must be qualified to give the expert testimony.

These principles have been applied to the admissibility of expert reports which critique a section 30 assessment.

In determining the admissibility of Acritiquing reports@ in *Mayfield v. Mayfield,* Wein J. provides a detailed analysis of the applicability of *Mohan*.[20] She notes, with some criticism, a practice that has developed whereby counsel in family law cases frequently file a critique of an assessment report. She also notes it is neither practical nor desirable to have either the children or the parties subjected to two sets of interviews by two assessors. She makes this further observation: AThere is no doubt that in family law cases, the rules of evidence often seem to be only loosely applied, if not ignored entirely.@

19 *R. v. Mohan, [1994] 2 S.C.R. 9*
20 *Mayfield v. Mayfield*, [2001] O.J. No. 2212, online: QL (Ont. SCJ)

In the result she held:

> While I would not go so far as to say that a critique of an assessment report could never meet the test for admissibility in a custody case, I am confident in ruling that in this case the necessity aspect of the test is not met. I would go so far as to say that in most cases, it is simply not necessary or appropriate to have the parties bring forward the evidence of a collateral critique. A social work critique may of course be done to assist counsel in formulating questions for cross-examination of the assessor or to assist counsel in developing an argument concerning the weight to be attached to an assessment report but it will rarely, if ever, be Anecessary@ to introduce the critique as original evidence or to call the critiquer as a witness. The expense in most cases could better be spared or applied to an independent assessment.

In *Greenough v. Greenough*, Quinn J. takes issue with the analysis in *Mayfield*, which held that it would be Ararely, if ever, be necessary to introduce the critique as original evidence or call the critiquer as a witness@.[21] Quinn J. thought the reverse to be true, particularly if the critiques speak to process rather than facts. Quinn J. went on to express concern about Aa practice that routinely left matters to the common sense of the trial judge as espoused in *Mayfield v. Mayfield*.@ Quinn J. did not think the methodology employed in preparing parenting plan assessments falls within the experience or knowledge of a judge (at least not all judges). The court set out the methodology for introducing this evidence and stated that the wife should not be obliged to adduce it before the other expert testified. Only after that expert=s cross-examination and, if necessary, re-examination could the need for critiquing evidence be fully known. Consequently, the wife need not call the Acritiquer@ as part of her case in chief and if she wished to adduce critiquing of evidence in reply, the issue of its admissibility would be considered at that time.

Johnson v. Brighton is a relocation case in which the father, who opposed the relocation, sought to tender the evidence of a clinical psychologist to testify regarding the effect of a move on a child

21 *Greenough v. Greenough*, [2003] O.J. No. 4227

and his attachment to his parents.[22] Counsel for the father argued that the *Mohan* threshold necessity test had subsequently been lowered by later cases, citing *McLean (Litigation Guardian of) v. Seisel,* [2004] O.J. No. 185 and *The Queen v. Marquard,* [1993] 4 S.C.R. 223. He argued that the court needed the expertise in order to fully and properly assess the attachment issues presented by the facts of the case. He stated that the expert=s opinions would help the court understand the potential impact of the potential move. He further argued that the expert possessed clinical tools that the court does not and he will give scientific criteria to the court against which it may test the accuracy of its conclusions.

Counsel for the mother argued the proposed evidence was not necessary and even though the expert was an acknowledged expert in the area of family and spousal violence, his expertise did not extend to the area of child attachment and the effect of relocation on that attachment. He urged the court to conduct a cost-benefit analysis and conclude that the evidence was not necessary.

After reading the expert report, the expert=s *curriculum vitae* and his apparent expertise in the area, Campbell J. concluded the evidence would be marginally helpful and, given the costs and delay which would arise if it were to be allowed, ruled it inadmissible.[23]

I. OTHER ESSENTIAL RESOURCES

In addition to the two companion texts referenced at footnote 16, I recommend a handful of other must-have texts for your library. *The Fundamentals of Trial Techniques* is an older but accessible

22 *Johnston v. Brighton,* [2004] O.J. No. 3267, online: QL (Ont. SCJ)

23 Other cases on this issue include:
Boomhour v. Boomhour, [2001] O.J. No. 5558
C.M. v. G.M., [1992] O.J. No. 1164
H. v. H, [2001] O.J. No. 533
Moody v. Moody, [1995] O.J. No. 1137
Sakran v. Sakran, [2001] O.J. No. 4763
S.P.M. v. W.B.M., [1988] O.J. No. 2785

text which includes 'how-to' examples of virtually every element of your trial.[24] Jeffery Wilson's two-volume text, *Wilson on Children and the Law* is an excellent resource.[25] *Sopinka on Evidence*, refashioned as *The Law of Evidence in Canada*, has the answer to any issue that is likely to arise at trial and should be at your counsel table with your Statutes and Rule Book. If you do a significant amount of parenting litigation your library is incomplete without the American Psychiatric Association, *Diagnostical and Statistical Manual of Mental Disorders*, namely the *DSM-IV-TR.*[26] Since your client, or the opposing party, may be on medication or health records may refer to various medications, I also recommend the Canadian Pharmacists Association, *Compendium of Pharmaceuticals and Specialties*.[27]

J. CONCLUSION

Prepare, prepare, prepare. The best advocates are those who are fully prepared at any stage in the proceeding. While we are all cost conscious and mindful of the principle of proportionality in a parenting dispute, there is considerable front-end loaded preparation that ought not to be delayed in the hopes of early settlement. Creating a detailed time-line will help your client focus on the facts that are most important. A time-line can be used at each stage of the proceeding; some of it can be found in an affidavit in support of an interim motion, it may be used at the questioning of the opposing party, it can be used at trial and to the extent that the trial evidence confirms what was in your original time-line, it is a useful summary to put in your Closing Submissions Brief. Ask your client to prepare a first draft or, alternatively, have a law clerk work with your client to prepare the first draft to control costs.

24 Thomas A. Mauet, Donald G. Casswell, Gordon P. Macdonald, *Fundamentals of Trial Techniques, Canadian Edition* (Little, Brown and Company, 1984)
25 Jeffery Wilson, *Wilson on Children and the Law* (LexisNexis, 1994)
26 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Assocation, 2000.
27 Canadian Pharmacists Association, *Compendium of Pharmaceuticals and Specialties* (Canadian Pharmacists Association, 1980)

All relevant records should be obtained at the outset of the case. Many of us focus on financial disclosure to the exclusion of health and education records, which are as important if parenting issues are in dispute. They often take longer to obtain and may require vetting to delete irrelevant portions on the basis of privacy and privilege. Depending on the nature of the document, they may not necessarily be admissible in their entirety as a business record. Only those portions of the health records which do not contain opinion evidence should be admitted as business records. See the decision of Jones J. in *CCAS v. L. (J.).*[28] In the case of certain counseling or health records, if you want the opinion to remain in as part of the evidence, you will likely have to call its author. Sometimes assessors are given such strict timelines that they are unable to obtain these records within the expected deadline for the release of their report. It is incumbent upon you to get them early, vet them for irrelevance and to maintain the integrity of your client's privacy interest in them by considering the law of privilege as it relates to this special category of evidence.

28 *Catholic Children's Aid Society of Toronto v. L. (J.), 2003 CarswellOnt 1685 (O.C.J.)* This analysis applies to CAS and police records as well.