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Family Law Newsletters
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— Epstein's This Week in Family Law

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Season's Greetings

Christmas, Hanukah and Kwanzaa are upon us. Supposedly a time for good will, peace and harmony, and yet, we see too little of it in the family law arena and the larger world around us. There are too many cases in the courts and not enough kindness and generosity from those litigants who would rather spend their money on their lawyer's children rather than their own. This is all perhaps mirrored in the hatred and intolerance being amply demonstrated by our neighbours to the South. Family law reform is not happening at the pace Canadians need and the cash strapped provinces are not able to advance the family law reform agenda. All in all, we have reason to be depressed. But, on the other hand, the year of cases reveals hard working judges wrestling with difficult cases and a system that functions well given the handicaps. Of course, we could do better, but we are seeing more mediation, collaborative law and a growing recognition that courts are not the answer to most separating families. Since I no longer litigate and only mediate (and sometimes arbitrate), this constant stream of weekly cases keeps me up-to-date about what is happening in our courts across Canada. How lucky I am to be able to do this! I want to thank my diligent editor at Carswell/Thompson Reuters, John Bossy, for his help in producing the weekly *Newsletter* and my wonderful assistants, Ellen Wallace and Pina Hantzakos, who keep me focussed on getting the copy out in time. And, yes, contrary to speculation, I alone write the *Newsletter*. I wish you all a Merry Christmas, Happy Hanukah, Happy Kwanzaa, and to all a happy and healthy New Year!

Common Law Relationship - Sharing of the Pension

Noel v. Butler, 2016 CarswellNB 366 (N.B. C.A.) - Green J.A., Baird J.A., French J.A. Ms. Butler is a high school teacher. She has always been a high school teacher. She began to cohabit with Mr. Noel. The parties had a 14-year relationship and never married. They never had children. The parties did acquire a home in which they lived, but it appears that Ms. Butler paid the entire down payment and spent her monies on renovations and that Mr. Noel made no financial contribution towards the property. He was on the covenant on the mortgage and the property was placed into joint tenancy. Ultimately he was awarded half the home. Mr. Noel claimed an interest in Ms. Butler's teacher's pension valued at almost $1,000,000. The trial judge found no merit in Mr. Noel's application and said this:

> With respect to Ms. Butler's pension, I am unable to identify either a tangible benefit to Ms. Butler or a deprivation on the part of Mr. Noel. Ms. Butler was a well-established teacher, who had been contributing towards her pension since 1985, when she and Mr. Noel commenced their relationship in 1998. There was no evidence that Mr. Noel contributed in any meaningful way to the Ms. Butler's ability to work as a teacher and accumulate her pension benefits during the course of their relationship. Indeed the evidence suggests that it would have been easier for Ms. Butler is she had been on her own during this period, given the reality:
>
> (i) Mr. Noel did not contribute in a meaningful way to the performance of household tasks;
>
> (ii) pre-2009 Mr. Noel's best case evidence is that his contribution to the payment of household expenses was at times approximately equivalent to Ms. Butler's; and
>
> (iii) post-2009 the household operated principally on income earned by Ms. Butler.

The trial judge could not identify any element of deprivation on the part of Mr. Noel or anything that Mr. Noel gave up or contributed to enable Ms. Butler to work as a teacher. Mr. Noel appeared to believe he had a more or less automatic right to share in the pension, but the facts do not support his claim.

The trial judge's analysis includes his comments that while it might be inappropriate in the ordinary case to permit Ms. Butler to walk away from a 14-year relationship with her pension intact with Mr. Noel being in his late 50s, underemployed and having significantly fewer financial assets;

> This analysis would, in essence, penalize Ms. Butler for continuing in a relationship with Mr. Noel in circumstances where he was contributing so very little. However, this analysis breaks down when Mr. Noel's $1-$1.1 million inheritance is taken into consideration.

There will be some of you who would say the result might well have been different had the genders had been reversed, but I do not think that is the case here. I think there was a careful analysis by the judge of the *Kerr v. Baranow*, 93 R.F.L. (6th) 1 (S.C.C.) factors. See for example *Slade v. Duguay*, 2015 CarswellNB 550 (N.B. C.A.). Mr. Noel simply failed to meet the test and his claim for a share in the pension was rightly dismissed.

Appeals in the Face of Non-compliance with Family Law Judgments

A. (A.) v. G. (Z.), 2016 CarswellOnt 14143 (Ont. C.A.) - K. Feldman J.A., Jent Simmons J.A., P. Lauwers J.A. This is an important judgment of the Ontario Court of Appeal signaling a new direction as to how the court will proceed when it is confronted with an appeal in the face of non-compliance with a family law judgment below.

In this case the respondent brought a preliminary motion asking the Court not to hear the appellant's appeal while he has not complied with orders of the trial judge respecting the payment of spousal support and posting security for future spousal support payments.

In Ontario, pursuant to Rule 63.01(1) of the Rules of Civil Procedure, such orders are not automatically stayed by an appeal. The husband did not move for a stay.

The Ontario Court of Appeal has dealt with this issue before in cases of *Brophy v. Brophy*, 45 R.F.L. (5th) 56 (Ont. C.A.), *Dickie v. Dickie*, 39 R.F.L. (6th) 1 (Ont. C.A.), *Murphy v. Murphy*, 56 R.F.L. (7th) 257 (Ont. C.A.). The Court of Appeal has reconsidered its position applied in previous cases. They now state categorically:

> In our view, where an appellant wishes to be relieved of his or her trial ordered obligations pending appeal, the proper approach is to bring a stay motion where the circumstances can be brought before the court. If that is not done, then although the court may still hear the appeal in circumstances the court feels require that approach, the court will normally not hear the appeal until the trial order has been complied with.

The Court in this case was not prepared to hear the appeal until the husband has complied with the support orders made at

trial and thus adjourned the appeal pending compliance.

Thus, in Ontario it is clear that if the payor is dissatisfied with the court order below and wants to appeal, and is not in a position to comply with the order pending the appeal, the proper procedure is to apply for a stay and file sufficient material, financial and otherwise, to demonstrate why the order below is wrong or cannot be complied with.

Repudiation of a Marriage Contract

Simmons v. Simmons, 2016 CarswellNfld 230 (N.L. C.A.) - Supreme Court of Newfoundland and Labrador Court of Appeal - B.G. Welsh J.A., M.H. Rowe J.A., M.F. Harrington J.A. The parties married in1989 and prior to being married entered into a marriage contract. The trial judge had no difficulty in finding that a marriage contract was valid and binding when it was signed. The parties separated in 2000 and the husband, post separation, wrote to the wife returning to her the agreement which was enclosed as a birthday gift. He told her that he would have other copies of the agreement destroyed if she would only reconcile with him. The wife agreed to return to the marriage, but wisely retained the letter and the enclosed agreement. The parties separated finally again in 2011 and the wife thus sought her full entitlement under the *Family Law Act* of Nova Scotia. The trial judge found that the marriage contract had been repudiated and the Court of Appeal agreed. The Court of Appeal noted that while the wife did not destroy the agreement or the husband's letter, she indicated her acceptance of the repudiation by reconciling. That was more than sufficient evidence of the acceptance of the repudiation, and accordingly, both the trial judge and the Court of Appeal concluded that the marriage contract had been validly repudiated and that it had no force or effect at the time of the parties' separation and divorce. Repudiation requires clear and convincing evidence. It was obviously present in this case.

The Spousal Equivalent and Child Deduction in Split Custody Case - Spoiler Alert

Harder v. R., 2016 CarswellNat 4358 (T.C.C. [Informal Procedure]) - Tax Court of Canada North Bay, Ontario - R.S. Bocock J. In this Tax Court of Canada case, the husband appeals the Minister's disallowance of claimed non-refundable tax credits. The Minister has disallowed the spousal equivalent and child deduction in a split custody case because the father paid the set-off amount to the wife, rather than have the support order set out an amount each parent would pay to the other. Because the father paid the set-off amount, he could not bring himself within the exception in section 118(5.1) of the *Income Tax Act*. I have written about this issue before and pointed out that in order to claim the deduction, there has to be payments going both ways for both parties to be able to claim the deductions. Although it is common practice to simply put the set-off amount in the agreement, and while it should be obvious to the Minister that the parties are both contributing, nevertheless, section 118(5.1) has always been interpreted strictly. Thus, as Justice Bocock points out "the court has no alternative but to dismiss the husband's appeal however sympathetic the court may be."

Justice Bocock notes "Utilization of a set-off mechanism does not render, memorialize, or transform each distinct value entered along that evolving path into a support amount under the Act." Under the settlement here, the wife was not required to pay support payments in the form of a support amount to the husband. The support amounts are solely and unilaterally paid by the husband and, thus, take him outside of section 118(5.1). In order to avail oneself of the deductions, there must be a mandatory requirement in the agreement or court order for each parent to pay a specific amount to the other along with conclusive evidence of the actual payment being made.

As Justice Bocock adds, "The practicing family bar should take note". Indeed, we should, but sometimes the law is an ass.

Ontario Court of Appeal - Custody - Alienation - Police Enforcement

L. (N.) v. M. (R.R.), 2016 CarswellOnt 19110 (Ont. C.A.) - Weiler, Blair and van Rensburg JJ.A. This was a very high-conflict custody case in which there was clear evidence of alienation by the mother. Ultimately, the father obtained an order giving him custody of two children and permitting the father to take the boys to attend the Family Bridges Program, an educational and experiential program which aims to resolve issues between parents and alienated children. The Court order also required the Toronto Police Services to assist as required to ensure the provisions of the order.

In the face of that order, the youngest child ran off and disappeared and went to his older brother's apartment. The child was retrieved by the police and returned to the father, but ran away again. The father tried to have the police enforce the order, but

the police ultimately declined and filed a motion to remove the police enforcement clause.

The mother brought a motion to change the custody order. By the time the matter came before the motions court judge, the youngest child was aged 16, living alone in an apartment and was completing high school. The oldest child, who was 18, was attending university. Justice Perkins in a comprehensive decision, reviewed earlier in the *Newsletter*, found that there had been material changes since the original court order, and that both children did not wish to go to the reunification program or live with the father, and it was clear that the police were unwilling to enforce the order.

In a somewhat landmark decision, Justice Perkins held that no person was to have custody or access rights over either of the children and access to information about each child was entirely within each child's own control.

The circumstances were somewhat tragic for the father. The mother had obviously succeeded in her campaign of alienation. Nevertheless, a very experienced family court judge concluded that nothing further could be done given the cemented wishes of the children and given their ages.

The father nevertheless appealed to the Ontario Court of Appeal. Not surprisingly he was unsuccessful. The Court of Appeal agreed with the motions court judge that there was a material change of circumstances entitling the court to vary the previous custody order.

The Court of Appeal also agreed that the motions court judge did not err in changing the custody order even in the face of proved alienation. The motions court judge recognized that the children's wishes may well have been tainted by the alleged parental alienation. Nevertheless, because the expressed wishes of the children were "strong, consistent and long lasting and they have been acted on by the children in defiance of the authority of both parents, the arbitrator, the police and this court's order" nothing further could be accomplished with further orders involving the children.

The Court of Appeal noted:

> I agree with the father's submissions that the jurisprudence indicates the wishes of the child and the best interests of the child are not necessarily synonymous. However, the motions judge referred to this existing jurisprudence as well as the jurisprudence that, as practical matter, older children will make their own residential choice: see, *Supple v Cashman*, 2014 45 R.F.L. (7th) 273 (S.C.), at para 17; *Ladisa v. Ladisa*, 11 R.F.L. (6ht) 50 (Ont. C.A.) at para 17. The motions judge carefully considered the father's submissions and gave cogent reasons for rejecting them, having regard to D.M.'s best interests. In the absence of any palpable and overriding error in the exercise of his discretion, which has not been demonstrated, this court cannot intervene in the change of the custody order.

The Court of Appeal also upheld the motions court judge's declaration that neither party has custody or access rights over the two children.

A very sad case indeed and a very unhappy ending for the father, the loss of a father figure for the children, and undoubtedly, horrendous costs for all concerned. If the purpose of this appeal for the father was his attempt to be able to demonstrate to his children, later in life, that he did everything possible to have a relationship with them, I suppose he has proved his point.

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