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— Epstein's This Week in Family Law

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Determining Valuation Date

Tokaji v. Tokaji, 2016 CarswellOnt 20010 (Ont. S.C.J.) - T.A. Heeney R.S.J. In virtually all provinces it is necessary to determine the valuation date for the purposes of determining the equalization of the party's net family property or the division of property.

Those provinces that use the valuation date standard definition, such as the Ontario courts, determine the date that the parties separated *and* there is no reasonable prospect that they will resume cohabitation. It is a conjunctive test as pointed out in *Rosseter v. Rosseter*, 38 R.F.L. (7th) 339 (Ont. S.C.J.), and parties who are not cohabiting are, therefore, separated. Cohabit is defined in the Ontario *Family Law Act* as living together in a conjugal relationship whether within or outside marriage. Determining whether parties are cohabiting or separated requires a careful factual analysis.

Here, I think the parties wisely agreed to bifurcate the issue of the valuation date. They determined the issue in a one-day proceeding before the trial judge. The parties had a *three-year* difference on valuation date, but it is clear from reviewing the wife's evidence which the trial judge was more inclined to accept, that she had chosen the later and correct valuation date. Justice Heeney reviews the leading cases on this issue being *Greaves v. Greaves*, 4 R.F.L. (6th) 1 (Ont. S.C.J.) and *Oswell v. Oswell*, 28 R.F.L. (3d) 10 (Ont. H.C.). Applying the factors set out in this case, there was no real physical separation of these parties until about July, 2014. They had continued to share the same bed at least one week a month, they had sexual relations from time to time, prepared meals and were interrelated financially. Justice Heeney took some comfort in the fact that the parties identified themselves for the purposes of income tax as being married. How parties treat their income tax return has been repeatedly held to be a relevant factor in determining whether parties are separated. Justice Heeney says this about sexual relations as it relates to separation:

> It has been held that the absence of sexual relations is not conclusive. In my view, however, where there is the presence of ongoing sexual relations, even as infrequent as one every couple of months, while the parties are physically living together, that is a strong factor in favour of a finding that the parties are cohabiting.

Bifurcating the issue of the valuation date is an economical use of the Court's resources. The parties could not settle this case easily without a determination of the valuation date because it had a significant impact on the equalization payment. Sometimes a valuation date differs by a few months and will make no difference. But often a difference of years could make a significant difference. As Justice Heeney notes in this case, determining the valuation date will facilitate settlement and far better for the court to spend a day determining the valuation date than to spend two weeks on a trial with conflicting dates.

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Child Support - Contracting out of the Guidelines

Z. (O.) v. Z. (M.), 2016 CarswellBC 3640 (B.C. Prov. Ct.) - Thomas S. Woods Prov. J. The mother is looking for child support from the father. The father opposes on the basis that he entered into an agreement with the mother, in Russia, that he would not have to pay child support.

While it is an unusual case and the contract was entered into in a foreign country, in the end, as this judgment makes clear, child support is the right of the child and the parties cannot bargain away that right.

Judge Woods of the Provincial Court of British Columbia notes that there can be circumstances where agreements that purport to define the party's entitlement to pay child support should be considered. Judge Woods notes that some agreements can be shown considerable deference, "particularly when there is a case to be made that, at the time the parties to them entered into their agreements, they reasonably believed that their bargains regarding child support provided adequately for the children." See *Willick v. Willick*, 1994 CarswellSask 48 (S.C.C.). However, if deference is going to be shown to such agreements, they must comply with their provincial or federal legislation. In this case the agreement did not provide at all for the support of the children, and as a result, they were given no weight.

Even if the agreement had been valid in Russia, the children are now in British Columbia and to give effect to that agreement, says Judge Woods, would be contrary to the law of British Columbia, and in any event, the agreement would be unenforceable in British Columbia on the grounds that to give effect to the terms would be contrary to public policy.

There is no doubt the parties could make an agreement for future child support provided that the agreement was intended to reasonably look after the future needs of the child. Thus, for example, the child support payor could agree to put property in trust for the child that the child could realize upon reaching the age of majority or by putting sufficient assets in the child's name so that there would be a need for child support at that particular time. However, agreements that provide for no child support or provide for child support that cannot be said to be reasonable in the face of the Guidelines is clearly going to lead to an argument that it is unenforceable.

Procedural Route for Setting Aside a Decision in an Undefended Trial - Ontario Family Law Rules

Gray v. Gray, 2017 CarswellOnt 1349 (Ont. C.A.) - Doherty, MacPherson and Lauwers JJ.A. The father has appealed to the Ontario Court of Appeal a trial judge's order made in his absence in the Superior Court of Justice, Family Division. The mother argues that the father must first bring a motion to set aside the trial judge's order in the Family Court before he can appeal to the Court of Appeal. This engages a discussion of Rule 25(19)(e) of the Family Law Rules.

In the proceedings below, the husband did not appear for trial, although I think he had a good reason that would have explained his absence. The trial judge did not see it that way and proceeded to conduct an undefended trial and made a very significant judgment against the husband.

The husband appealed and also brought a motion in the Family Court to set aside or change the trial judge's order pursuant to rule 25(19)(e) of the Family Law Rules. I think that the husband's counsel, wisely, concluded that there was some confusion as to the appropriate route for setting aside the judgment and decided he would use both routes. This leads the Court of Appeal to discussing in detail Rule 25(19) of the Family Law Rules and try to resolve the conflicting jurisprudence. There are a host of cases that have wrestled with this somewhat unclear rule and they are clearly conflicting. See for example *Boers v. Boers*, 2010 CarswellOnt 1053 (Ont. S.C.J.); *Gotkowski v. Gotkowski*, 2012 CarswellOnt 12420 (Ont. S.C.J.); and *Chambers v. Johnson*, 2002 CarswellOnt 1455 (Ont. C.J.). On the other hand, there is *Diciaula v. Mastrogiacomo*, 27 R.F.L. (6th) 49 (Ont. Div. Ct.), *Boivin v. Smith*, 92 R.F.L. (6th) 432 (Ont. C.J.); *Einstoss v. Starkman*, 87 R.F.L. (6th) 346 (Ont. S.C.J.); *Farhan v. Farhan*, 2012 CarswellOnt 15058 (Ont. S.C.J.) and *Ontario (Director of Family Responsibility) v. Dick*, 29 R.F.L. (7th) 500 (Ont. C.J.).

As the Court of Appeal notes, some courts have relied on their inherent jurisdiction to set aside an order to prevent a miscarriage of justice. See, for example, *West v. West*, 18 R.F.L. (5th) 440 (Ont. S.C.J.).

Some courts have resorted to Rule 19.08 of the Rules of Civil Procedure. See *Gray v. Rizzi*, 2010 CarswellOnt 7120 (Ont. S.C.J.), and other cases cited in this judgment.

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The Court of Appeal has settled the issue. In its opinion, Rule 25(19)(e) includes the authority to set aside an order. The Court of Appeal finds no reason to import the provisions and language from the Rules of Civil Procedure as they find it is Rule 25(19)(e). The Court may decide that the most efficient remedy is to vary the order at issue without setting it aside.

> However, the court may instead determine that the order needs to be set aside entirely; a variation of the order at issue would not produce a just result. For example, a new hearing on the merits may be required.

Accordingly, the Court of Appeal has decided that the proper procedural route in this case was to bring a motion under Rule 25(19) of the Family Law Rules, rather than appeal to the Court of Appeal. The Court, of course, noted that it retains jurisdiction to hear any appeal of a final order under Rule 25(19).

The Court of Appeal seems to acknowledge that there is significant merit in this appeal and that the husband was likely denied a fair opportunity to put his case. I say that because the Court of Appeal dismissed a motion to quash here, but ordered the appeal scheduling unit to delist the matter until the motion to set aside has been decided by the Family Court. If the motion to set aside is dismissed, he may appeal to the Court of Appeal with an amended notice of appeal. I cannot think of a much stronger message that the Court of Appeal is sending to the motions judge with respect to the upcoming motion to set aside.

Parenting Coordinator's Fees - Review of Parenting Co-ordinator Accounts

Scott v. Kallur, 2016 CarswellBC 3574 (B.C. S.C.) - Skolrood J. This was a summary application by a parenting co-ordinator [PC] to recover fees from parties to a parenting coordination agreement.

The parties jointly chose the parenting coordinator and signed the parenting coordinator's standard agreement. The PC provided parenting coordination services to the husband and wife and rendered accounts for very substantial fees.

On his own evidence, the parenting coordinator noted that he had billed the parties just under $70,000 in total. While I have no idea of the level of conflict between the parties, the amount of parenting coordination fees are staggering. This may be the reason some other courts in British Columbia have been reluctant to appoint parenting coordinators where parties of average means complain that they cannot possibly afford these kinds of services.

There are few families in Canada that can afford to spend $70,000 of non-deductible parenting coordination fees in order to resolve disputes about their children. The parties would be well advised to consider other ways of resolving the disputes including entering into highly structured multidirectional orders to try to eliminate areas of dispute.

The British Columbia *Family Law Act* now provides for parenting coordination that deals with qualifications and other matters about parenting coordination. However, there is a lacuna in the new rules and regulations in that there is no provision for a review of a parenting coordinator's accounts similar to a review of lawyers' bills. Accordingly, when there is a fee dispute it becomes a contractual matter between the parenting coordinator and the parties. At the present time, absent new laws or regulations, that contract dispute will have to be resolved by a court of competent jurisdiction.

The PC here claims that this is a simple claim in debt that is suitable for determination by summary trial, but Justice Skolrood disagrees. No doubt the size of the accounts and the punitive interest terms (18 per cent) shocked the learned justice. Justice Skolrood found that while the retainer agreement is the principle document governing the relationship between the parents and the PC, since the PC was appointed pursuant to a court order, the Court retains a supervisory jurisdiction with respect to activities and decisions of the PC.

Justice Skolrood was not satisfied that the evidence produced by the PC was sufficient to justify a judgment in the summary trial procedure. The accounts were a little more than a bald assertation of the services. It appears that the PC billed after a time when the services should have ceased. He claimed very significant interest without appropriate interest provisions in the PC agreement. The PC's application for summary judgment was dismissed, but in summary Justice Skolrood wanted to send a message to the family law bar and to PCs with respect to their future conduct. He noted:

> Parenting coordinators play an important role in family law disputes. They provide parents with a forum for resolving specific issues outside of the court process, in what is intended to be an efficient and cost effective manner.

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> Given the stakes involved in family cases, it is not unusual for one or more of the parties to be unhappy at the end of the process. Unhappiness with the result, however, is not a basis for challenging a parenting coordinator's services or accounts after the fact, and I do not intend this decision to be an invitation for such challenges.
>
> That said, parents involved in disputes about children are often very vulnerable and parenting coordinators have a considerable degree of discretion in what they do. It is only fair and reasonable that there be some means of holding them accountable. It may be that a review mechanism similar to that existing for lawyer's bills under the LPA would be appropriate , but failing legislative amendment, it falls to the court as part of its supervisory role. That role is particularly important in cases such as this in which the parenting coordinator was appointed by court order.

This is a useful contribution to the growing literature about parenting coordinators and financial problems that people can get into if they decide that parenting coordination is going to be a panacea and solve their problems. There is no question that there is a role for parenting coordinators in the system. However, most family law litigants are of modest means and have already been drained by being in the adversarial system. The parties should consider a multidirectional order approach to governing their parenting arrangements before they decide to embark on what may be an expensive road in parenting coordination.

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