VOGEL

THE TOP 5 QUARTERLY FAMILY LAW REVIEW
INCLUDING 5 BONUS COVID-19 CASES

Volume 2, Issue 4

1. CMM v RMM, 2020 ABQB 480

J.T. Eamon, J.C.Q.B.A.

Plaintiff/Respondent - T.J. Zappone

Defendant/Applicant - A. Letourneau, Q.C.

Matrimonial Property; Limitation

The married parties separated in June 2016. The Plaintiff filed for divorce but did not commence a combined action for divorce and division of matrimonial property. A Divorce Judment was granted on February 13, 2017.

In May 2018, the parties obtained legal representation to deal with matrimonial property division and began gathering and exchanging financial disclosure. The parties' respective lawyers never discussed the need to commence a matrimonial property action. The lawyers last corresponded with each other on December 11, 2018. The limitation period expired on February 13, 2019, two years after the Divorce Judment was granted. The Defendant's lawyer was appointed as a judge six days later. The Plaintiff's lawyer then discovered that the Defendant had ended his retainer with his lawyer in late December 2018. Shortly thereafter, the Plaintiff instructed her lawyer to commence a matrimonial property action, which was filed on March 26, 2019.

The Defendant applied to dismiss the matrimonial property action on the basis that it was commenced more than 2 years after the date of the Divorce Judment, and therefore the limitation period in s. 6 of the *Matrimonial Property Act* had expired. The Plaintiff acknowledged that the action was brought more than 2 years after the Divorce Judment, but argued that the limitation was extended or suspended by a standstill agreement, or alternatively, that the Defendant was precluded by promissory estoppel from asserting that it expired.

Justice Eamon noted that in matrimonial property actions, the court may infer an agreement to extend or suspect the limitation period from the parties' words and conduct, and that such an agreement does not need to be in writing (in comparison to the requirement of the *Limitations Act* that a standstill or similar agreement be in writing). In addition, Justice Eamon noted case law (including the Alberta case of Weir-Jones) to the effect that ongoing, normal dealings between parties attempting to resolve a claim are not sufficient to infer a waiver or promise to suspend a limitation period.

The Plaintiff argued that she had relied to her detriment on the Defendant's words and conduct and believed that no action would be taken while negotiations were ongoing and further submitted that it was common practice for family law practitioners to engage in negotiations with the understanding that action is suspended during those negotiations.

Noting Rule 7.2-3 of the *Law Society Code of Conduct* (avoiding sharp practice), Justice Eamon cited the commentary to the rule which provides that a Defendant's lawyer does not violate this rule by allowing a limitation period to expire. Further, there was no evidence that the Defendant's former lawyer actually believed there was a standstill agreement in place or that she accepted the existing of a common practice among family law practitioners.

Justice Eamon concluded that the record was sufficient to resolve the matter on a summary basis and that there was no genuine issue for trial regarding a common practice among the family bar or applied between the lawyers for the parties. The matrimonial property action was therefore dismissed, having been commenced after the expiry of the limitation period set out in the *Matrimonial Property Act*, with costs awarded to the Defendant.

Practical Implications: Negotiations in the normal course between counsel on matrimonial or family property division *do not stop* the limitation period in the *Matrimonial Property Act/Family Property Act* from running.

2. Kaushal v Kaushal, 2020 ABCA 340

Antonio, J.A.

Applicant - A. Hayher and K. Anderson

Respondent - R. MacKenzie

Security for Costs

The parties were subject to a divorce action in which the Wife filed a Statement of Claim to determine parenting, child support, spousal support, and matrimonial property division. In 2017, the file was placed under Case Management. The Case Management judge made approximately 20 Court Orders from 2017 to 2020, most of which were in regard to the Husband's lack of proper financial disclosure. The Husband was found in contempt of court 5 times between October 2017 and December 2018, resulting in his incarceration in one instance.

In June 2020, the Case Management Justice ordered a consent litigation plan in preparation for a 7-day trial scheduled to commence in October. The Husband failed to meet deadlines imposed by the Order, including failing to provide his affidavit of records and his updated financial disclosure by the dates set out and consented to. The Husband was found in contempt of court for a sixth time on August 14, 2020. Pursuant to Rule 10.53(1)(d) of the *Alberta Rules of Court*, the Case Management judge made an Order to strike the Husband's pleadings on the issues of child support, spousal support, and matrimonial property division, with these issues to then be dealt with by way of summary trial. The Husband appealed the Order to strike pleadings on various grounds. The Applicant Wife then sought an Order for security for costs against the Husband in the amount of $40,000.

The test for security for costs is outlined in Rule 4.22 of the *Alberta Rules of Court*. The Court may order security for costs if the Court considers it just and reasonable, considering:

a. Whether it is likely the Applicant for the Order will be able to enforce an Order or judgment against assets in Alberta;

b. The ability of the Respondent to the application to pay the costs award;

c. The merits of the action in which the application is filed;

d. Whether an Order to give security for payment of a costs award would unduly prejudice the Respondent's ability to continue the action; and

e. Any other matter the Court considers appropriate.

In support of her position, the Wife argued that it was unlikely she would be able to enforce an Order against the Husband, who had admitted previously that he had no permanent residence in Alberta and that his restaurants were suffering due to the COVID-19 pandemic. Further, the Wife submitted that the Husband already owed approximately $30,000.00 from previous outstanding costs awards, and the merits of his appeal were unclear.

The Husband argued in response that he did have some assets available against which the Wife could enforce an Order if necessary, that he had paid all previous costs awards, and further submitted that a summary trial would be prejudicial to him and he would have the ability to pay a costs award over a long period of time.

The Court granted the Wife's application for security for costs in the amount of $40,000 on the basis that the Husband was unlikely to comply willingly with any costs Order and that it was unlikely the Wife would be able to enforce an Order against any Alberta assets of the Husband. Further, the Husband did not argue that the costs award would unduly prejudice his ability to continue the appeal. Finally, Justice Antonio determined that the Husband's appeal was not so meritorious as would make an Order for security for costs inappropriate.

Practical Implications: An Order for Security for Costs is appropriate in family law appeals, particularly in instances where the party against whom security is sought is unlikely to comply willingly with a costs Order and fails to provide concrete financial information to the court.

3. Oslanski v Oslanksi, 2020 ABCA 297

Wakeling, J.A.
Applicant - D.L. Harms, Q.C.
Respondent - N.J. Van Duyvenbode
Application for Stay of Order

Stay; Welfare of Child; COVID-19

The Honourable Justice P.R. Jeffrey granted a Final Child Custody Order in May 2019 directing that the child reside with the Mother in Sugar Land, Texas (the "Custody Order"). Following the Father's 2020 summer access with the child in Calgary, he refused to return the child to the Mother citing concerns regarding COVID-19 in Texas. As such, the Mother obtained an enforcement Order in August 2020 directing same (the "Enforcement Order"). The Father appealed the Enforcement Order and applied for a stay of both the Custody Order and the Enforcement Order pending appeal.

The Court noted that the test for a stay requires "minor modification" when involving the welfare of a child, and stated the 3-part test as follows:

1. First, has the Applicant established that the likelihood the Applicant will prevail on the appeal is high enough to justify the conclusion that the appeal is not frivolous or vexatious?
2. Second, has the Applicant established that the child, or the Applicant, will suffer irreparable harm if the stay is not granted?
3. Third, has the Applicant established that the harm the child or the Applicant will suffer if a stay is not granted exceeds the harm the child or the Respondent will suffer if a stay is granted?

If the court concludes that the failure to grant a stay will cause the child irreparable harm, assuming that the Applicant passes the other two parts of the test, the proper disposition is clear — issue a stay. If the court concludes that a stay will not cause the child irreparable harm, but will cause the Applicant irreparable harm, the court should grant a stay, assuming that the Applicant passes the other two elements of the test.

The court ultimately concluded that the Father did not meet the test for a stay of either the Custody Order or the Enforcement Order.

Under the first step of the test, Justice Wakeling found the appeal to be frivolous because the outcome of the appeal would not alter the legal obligations of the parties. He reasoned that the Father should have applied to vary the Custody Order if he believed that the pandemic constituted a material change, rather than refuse to return the child, an option that was not legally available to him. As he did not apply to vary the Custody Order, he would be bound by the terms of same regardless of any stay of the Enforcement Order. The court noted that it does not have the jurisdiction to stay the Custody Order as "it is not the subject of an extant appeal"

The court further found that the child would not suffer irreparable harm if the stay was not granted. While Justice Wakeling acknowledged "that the COVID-19 pandemic has swept over Texas", he was not convinced that the risk to the child was any greater in Texas with the Mother than in Calgary with the Father. The court was favourable to the Mother's evidence that she adopts precautionary measures and would drive to Texas as opposed to flying. The Father also acknowledged that the Mother was a caring and loving parent.

Lastly, the balance of convenience favoured the Mother as the Father did not demonstrate "that the harm his daughter will suffer if a stay is not granted exceeds the harm she will suffer if a stay is granted." It was significant to the court that the child had connections to the community in Texas and ultimately concluded it was in her best interest to return.

Practical Implications: There is a modified test for a stay in the context of an Order concerning the welfare of a child. The Court of Appeal does not have the jurisdiction to stay an Order that is not the subject of an extant appeal.

4. Michel v Graydon, 2020 SCC 24

Reasons for Judgment - Brown J. (Moldaver, Côté, Rowe and Kasirer JJ. concurring)
Concurring Reasons - Martin J. (Wagner C.J. concurring); and Abella J. (Karakatsanis J. concurring)
Appellant - P.M. Mennie and M. Sobkin
Respondent - R. Dueckman, K. Tiwana and S. Duguay
Intervener - J. Klinck, D. Klaudt and J. Sealy-Harrington

Retroactive Child Support; Variation

The parties lived together in a common law relationship from 1990 to 1994 and had a child, AG, born in 1991. After the parties separated, AG lived with her Mother. Pursuant to a Consent Order made in 2001, the Father agreed to pay child support of $341 per month based on his stated annual income. As the Mother was receiving government income assistance and disability benefits, the Father's child support payments were made to the BC government and then transferred to the Mother. The government never sought an increase in child support payable by the Father.

In 2012, the Father obtained an Order to end his child support obligations on the basis that AG was no longer a "child" under British Columbia's *Family Law Act* ("FLA"). It was later discovered that the Father had underreported his income at the time of the 2001 Consent Order and had not reported further increases to his income since then.

In 2015, the Mother applied for a retroactive increase in child support going back to 2001, pursuant to s. 152 of the FLA. The Father argued that the court had no jurisdiction to Order retroactive child support on the basis that at the time of the Mother's variation application, AG was no longer a "child" under the FLA. The B.C. provincial court hearing judge rejected the Father's argument and ordered him to pay $23,000 in retroactive child support, reflecting his increased income from 2001 to 2012.

On appeal by the Father, the B.C. Supreme Court overturned the decision of the provincial court, finding that pursuant to *DBS v SRG, 2006 SCC 37*, an application for child support under the FLA must be made while the child is still a "child". The BC Court of Appeal dismissed the Mother's appeal.

At issue before the Supreme Court of Canada was whether a court has jurisdiction to grant a retroactive child support Order (applied for under provincial legislation) when the child support beneficiary is no longer a "child" under the provincial legislation. More specifically, "the question before the court was is it possible to vary a child support Order after the Order has expired and the child ceases to be a "child"?"

The Supreme Court held that s. 152 of the FLA authorizes a court to retroactively vary a child support Order, regardless of whether the beneficiary is a "child" at the time of the application, and regardless of whether the Order has expired.

Justice Brown, writing for the majority, held that while courts have no jurisdiction to hear originating applications for child support under s. 15.1 of the *Divorce Act* if made when the child is no longer a "child of the marriage" (pursuant to DBS), the same bar does not apply to varying existing child support Orders in the same circumstances (DBS did not decide that issue). Furthermore, where the provinces enact their own legislation governing child support, it is the provincial legislation that governs a court's authority to grant retroactive child support.

Section 152(1) of B.C.'s FLA contains no reference to the defined term "child" that would qualify the court's authority to vary a child support Order. As a result, the section authorizes a court to change, suspect or terminate an Order respecting child support, prospectively or retroactively, regardless of whether the child(ren) at issue are still "child(ren)" as defined by the *Act*.

The Mother's appeal was therefore allowed with costs throughout.

Concurring Reasons of Martin, J. (Wagner, C.J. concurring)

Madam Justice Martin, concurring in the result, spoke to other compelling reasons as to why section 152 of B.C.'s FLA should be interpreted to allow retroactive variations of child support Orders in circumstances where there is no longer a child for whom child support is payable.

With respect to broader societal norms, Justice Martin reasoned that preventing claims of this nature places a disproportionate burden on women, as women continue to bear the bulk of childcare and custody obligations as well as earn less money than men. Family law requires a holistic approach taking into account the interconnected nature of issues of child support, child poverty, and the consequent feminization of poverty.

Moreover, interpreting section 152 of B.C.'s FLA in a matter which precludes these applications is adverse to the pre-existing common law rights of children and to the interests of recipient parents, which should be avoided

absent clear statutory expression. The best interests of the child, which are intrinsically tied to those of their caregiver, are in favour of reading s. 152 of the FLA to allow applications for historical child support.

Practical Implications: Strictly speaking, this case is only directly relevant to the interpretation of the British Columbia *Family Law Act*. However, this decision appears to lend support to the approach taken by the Alberta Court of Appeal in *Brear v Brear, 2019 ABCA 419*, in which the Court determined that an Applicant was not precluded from bringing a child support variation application pursuant to section 17 of the *Divorce Act* for a child who was no longer a "child of the marriage" as defined therein.

Important Note: The family law bar should continue to keep a close watch on developments in the law on this issue. The Supreme Court of Canada heard on November 4, 2020 the appeal of *Colucci v Colucci, 2019 ONCA 561*, in which the Ontario Court of Appeal came to the opposite conclusion of our Court of Appeal in *Brear*, finding that, pursuant to DBS, the Court did not have the jurisdiction to vary a child support Order pursuant to section 17 of the Divorce Act where the child for whom the Order was made was no longer a "child of the marriage".

5. Harder v Sartorio 2020 ABQB 404

N.E. Devlin, J.C.Q.B.A.
Plaintiff/Respondent: K. Krochak and L. Coffell
Defendant/Applicant: L. Allen

Conflict of Interest; Domestic Contract

The parties were married in 1992 and separated in 1997. Shortly before the marriage, the parties signed a prenuptial agreement to protect the Husband's interest in his family's automobile dealerships. Following separation, the parties entered into a Divorce and Property Contract (the "Contract"), which set out child support, spousal support, and division of matrimonial property. The Contract included clauses regarding legal advice in relation to the matrimonial property and further stated that the Contract "shall not be affected by any reconciliation of the parties". Following execution of the Contract, the parties did in fact reconcile and continued their relationship until 2019.

Following separation in 2019, the Wife filed a Statement of Claim for equal division of matrimonial property. However, the Husband plead that the Contract was still in effect. The Wife was provided with independent legal advice for the Contract by "Soby Boyden Lenz" ("SBL") and re-retained the same law firm in relation to the 2019 action. The lawyer who provided her with independent legal advice had retired and it was different lawyers within the firm representing the Wife.

The Husband submitted that the Wife's counsel could not attack the enforceability of the Agreement because this created a "two-faceted conflict of interest" as the Wife's former counsel would likely be a relevant witness and his firm would be barred from examining him on the witness stand. Further, he argued that any limitation to SBL's "conduct of the case" fosters a risk that the Wife could later claim inadequate representation if she did not like the results. In response, the Wife acknowledged the potential conflict of interest, however, she made an informed choice to retain. Further, the Wife's counsel submitted that their litigation would be limited as they did not intend to allege duress or challenge the ILA. Accordingly, they would not be calling the Wife's former counsel as a witness. Counsel advised that the Wife was aware of all potential conflict and the repercussions of same.

Justice Devlin first considered the following governing and intersecting principles:

1. Conflicts of interest must be avoided;
2. Examining related lawyers as witnesses creates a conflict;
3. "Attacking and defending one's (of one's firm's) own work is an awkward fit with a lawyer's obligations". In particular, the client's entitlement to a fulsome representation without limit by personal connections and the integrity/ finality of litigation;
4. An informed client is at liberty to waive a conflict that "affects only the potential quality of their representation and does not implicate the rights of the opposing party";
5. Individuals have a right to choose their own counsel, provided it is consistent with the administration of justice;
6. "Removal of counsel must not be permitted as an improper tactic"; and
7. Courts are hesitant to interfere with the solicitor-client relationship unless it is to "relieve the

risk of real mischief and not a mere perception of mischief".

The Court also notes that case law supports the conclusion that "the mere potential that a related lawyer will be called is insufficient to remove counsel of choice at a very early stage in the litigation".

After a thorough application of the principles, Justice Devlin dismissed the Husband's application. However, the court first established that the Husband's application was brought in good faith as the concerns raised with respect to the conflict posed a real risk to the litigation. The risk was ultimately addressed by the informed waiver of conflict entered into by the Wife regarding SBL's prior involvement and the limitations on the subsequent representation. The court further directed that the Wife is estopped from advancing any line of argument in relation to duress, inadequate legal advice at the time the Contract was executed, that she was unaware of the conflict with SBL or limitations related to same, or that she was misled when deciding to re-retain. The estoppel is binding even if the Wife changes counsel. In sum, the estoppel was sufficient to "protect the administration of justice from the potential conflicts in this case".

Practical implications: Justice Devlin concludes his decision with "Guidance for the Bar in similar circumstances" that is replicated in full as follows:

> ***Ms. Allen strenuously argued that the need to bring this matter to court highlighted why family law firms should not, as a rule, act for a party seeking to escape or circumvent a domestic contract that same firm had a hand in creating. There is wisdom in that position. Litigants should be spared the time and expense of having to bring motions such as this in the future. Justice dictates that the problems caused by this sort of retainer lie at the feet of the firm that insists on acting and the client who choses them.***
>
> ***It is not for this Court to pre-ordain what steps between the parties will satisfy the conflict of interest concerns outlined in this case. Suffice to say that counsel have an ethical and practical obligation to identify these issues, advise their clients fully, and provide comfort to the potentially prejudiced party. Those who fail in that task may well suffer the consequences in the form of cost awards that indemnify the other party if motions similar to this are necessitated in the future.***