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**General**

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

Various authors contribute to the text of the OFLM.

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

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## A proposal for the tort of financial abuse in family law

David Frenkel, Ainsley Doell

### *Overview*

The following article summarizes the prevalence of financial abuse in family law matters. It also proposes introducing a tort of financial abuse so that courts have a way to adequately describe its occurrence on victims and properly compensate for its effects.

### *Introduction*

In recent years, there has been increasing attention on the prevalence of family violence and the need for our legal system to better account for its effects. Family violence can occur during relationships and after separation, and has a significant impact on the health and wellbeing of families.

Building on the discussion of family violence and torts from our August 2023 OFLM publication, we would like to call attention to the issue of financial abuse. Financial violence can be more difficult to identify than some other forms of abuse, but can be just as insidious.

Changes to the federally-enacted *Divorce Act* (RSC 1985, c 3) in 2022 introduced a definition of "family violence" which included "financial abuse".

The definition was intentionally expansive, to provide the Canadian justice system with the flexibility to respond to the unique circumstances of families the different ways in which abuse can and does occur within them. And "family violence" is now a relevant factor that shall be considered when determining the best interests of the child.

This article will narrow the focus on financial abuse and provide an overview of factors which have been considered by Canadian courts to constitute such abuse. We also seek to answer the following questions:

- How has Canadian jurisprudence described financial abuse?
- If a party establishes that financial abuse has occurred, are costs awards sufficient to compensate for the losses arising from such abuse?
- Would a financial abuse tort be a positive addition as a tool in family law litigation?

### *Describing financial abuse*

While there are significant barriers to proving any kind of abuse in court, it is clearer with some forms of abuse what it is that judges may find persuasive. For example, judges may consider evidence of injuries or medical reports in assessing allegations of physical abuse.

With financial violence, however, it is less clear what sort of conduct rises to the level of abuse that the *Divorce Act* seeks to address. This is complicated further by the fact that successful claims of family violence are not often made on the basis of financial abuse alone. The factors enumerated in the *Divorce Act* often exist in concert and reinforce each other: Spouses who experience physical abuse often also experience psychological abuse, for example. The fear or expectation of physical harm can lend weight to coercive behaviour and threats (see Marie Eriksson & Rickard Ulmestig, ""It's Not All About Money": Toward a More Comprehensive Understanding of Financial Abuse in the Context of VAW" (2021) 36:3-4 Journal of Interpersonal Violence NP1626).

As pointed out in sources quoted by Eriksson and Ulmestig in their paper, 75% of women who suffered from physical and/or psychological abuse from a male partner also experienced financial abuse. They also refer to research that shows how

"…abusive men use courts to harass their victims, and how having an economic advantage makes their strategy even more effective."

What follows is an overview of some descriptions that Canadian courts have used to identify financial abuse.

### *a. Controlling family finances*

It is often the case that one person in a relationship takes responsibility for managing family finances. In some cases, this may be unproblematic and simply a practical decision in dividing household responsibilities.

However, it is important to be mindful of the fact that this division of responsibilities can lend itself to a situation where one partner's access to money is controlled, in whole or in part, by the other. The case law suggests that whether control over family finances rises to the level of financial abuse is highly fact-specific.

In *M.W. v. N.L.M.W.* (2021 BCSC 1273), the wife alleged that her husband's controlling behaviour amounted to financial abuse. The husband had placed family assets in his sole name, limited the claimant's access to family money during their relationship, was occasionally late or short in his support payments, and interfered with the claimant's business post-separation.

With respect to one of the wife's claims, the court did find the husband's call to his credit card company alleging that the wife's ink purchases were unauthorized was financial abuse and constituted family violence. Given the timing, the court reasoned that it was clearly a reaction in anger to the wife leaving the family home with the child, and was intended to cause issues for her in her existing business relationships.

In *Petrie v. Lindsay* (2019 BCSC 371), the wife had no knowledge of or access to the family finances, and the husband made her sign financial documents that she did not understand. As a result, she was unaware of her financial obligations with respect to payments for the family home.

Prior to separation, the husband removed all of the funds from their joint bank account. Given the context of financial control, this draining of the account was found to be abusive. Justice Sharma stated that "it could not have been a surprise to [the husband] that without financial assistance from him, [the wife] would be in a dire situation" (at para. 157). It was also significant that the husband would occasionally leave without notice, leaving the wife without access to money (at para. 19).

In *D.D.R. v. K.T.R.* (2019 BCSC 1805), the mother similarly had no access to joint financial information or accounts. She had only a credit card with which to pay for things and required the consent of the father before doing so. When she tried to access financial records, the father responded to this 'invasion of privacy' by stealing her laptop, which led to a physical altercation. Upon learning of the mother's infidelity, the father retaliated by cancelling the mother's credit card and draining their joint funds.

Justice Francis found that there was financial abuse and that by controlling the mother's finances, the father "enhanced [his] ability to control most elements of the mother's life" (at para. 85).

Other elements of financial control include influencing a dependent spouse to transfer their personal savings and Canada Tax Benefit payments received for children (*M.H.S.S. v. M.R.*, 2022 ONCJ 550). In *M.H.S.S.*, the parties' children were in the full-time care of the dependent spouse, and the government benefits were her only source of income (at para. 283). The court found that the father was financially abusive, noting several examples of the abuse:

- the mother did not know where the when the father was working or how much he earned;
- the father constantly pressured the mother to give him her Canada Tax Benefits she received for the children; and

- after separation, the father applied for and received the children's tax benefits instead of the mother (despite the mother being the full-time caregiver of the children), which caused the mother and the children financial hardship.

### b. Post separation: Refusal to pay support

A party refusing to pay support after separation until there is a court order has been found to be financial abuse in Ontario. This is especially so where it is clear that the party has the means to pay.

In *F.S. v. M.B.T.* (2023 ONCJ 102), the father refused to pay the mother child or spousal support, claiming that he wanted the court to decide whether it was appropriate, taking into account that he was not seeing the parties' child.

The father claimed that he lacked the financial means to support the mother, which Justice Sherr found to be "outrageous" and simply not true, as he had received $400,000 from the sale of his home and had sent upwards of $80,000 to family members abroad (at para. 131).

Justice Sherr made a finding of financial abuse as the father's conduct was coercive, controlling, and designed to "financially punish" the mother.

An alleged inability to pay support was also quickly dismissed in *M.H.S.S. v. M.R.* (2022 ONCJ 550): Justice Zisman found that while an award for retroactive support would create some financial hardship for the father, he "created this situation" by not making any payments between separation and the court order (from October 2019 until March 2022). He should have been aware of his obligation to support his children. Further, it was necessary to consider the hardship that would be created for the mother and children if a retroactive support award was *not* made.

A similar situation occurred between the parties in *N.M. v. S.M.* (2022 ONCJ 482), whether the father was found to have been intentionally paying very little support, despite the ability to pay "generously." Justice Sherr, once again, found that this was

abusive conduct intended to mother's life difficult, as it meant that she had to work longer hours in order to support herself and their children.

Importantly, Justice Sherr notes that the father's failure to provide proper financial disclosure, in contravention of many court orders, was itself manipulative and controlling. It made it difficult to calculate his income for support purposes, unduly complicating the legal proceedings.

Finally, a 2018 British Columbia decision provides an example of financial abuse at its finest. The case included text messages from the husband which starkly describe an malintent that is common in other such cases:

> Wait til the end of the month o I can't wait
> 1200 bucks ur not getting a penny more
> Bahahahaha I'm going to sit bk and laugh
> …
>
> I'm going to make ur life as hard as a [sic] possible can, a living hell….
>
> …
>
> Everything u do to me I'm going to punish u ... Keep acting like this I'm going to punish u a lot worse ... Financial u name it ... Ur not getting ur 2500 til June 1 and if u take me to court ur not getting it ever again

It should be noted that in all four of the cases discussed above, the allegations of family violence were not only for financial abuse and included elements of physical abuse.

### *c. Litigation abuse*

It is widely acknowledged that litigation can be financially and emotionally draining for parties. But when litigation is conducted in a manner than appears to be motivated by the intention of financially harming a spouse, *Dworakowski v. Dworakowski* (2022 ONSC 1270) suggests that this may be found to constitute family

violence. In *Dworakowski*, Justice Papageorgiou held that that the father's misleading evidence with respect to his income constituted bad faith and an attempt to mislead the court as to his actual income so as to reduce both his spousal and child support obligations. For example, the court found it unbelievable that that father claimed he only earned $24,000 from his business and that it had expenses of almost 90% of its gross income.

In *Daher v. Khanafer* (2023 ONSC 3877), the court found that the husband engaged in abusive litigation by not following court orders and that there was no justification for such conduct.

In *K.M. v. J.R.* (2022 ONSC 111), Justice Pazaratz referred to litigation abuse when describing one of the parties planning a motion within hours of consenting to a final order. This was a way of parents dealing with their "unfinished business" which they will try to rehash under the guise of motions to change.

In *L.E.S. v. J.C.S*. (2021 BCSC 2087), Master Muir found that the father had inflicted psychological and emotional abuse on the mother and child during the relationship that amounted to family violence. The father, however, did not stop with the start of litigation and continued with abuse. Specifically, the court found that the father refused to financially support the mother and child, delayed in producing financial disclosure, disobeyed a court order and forced the wife to bring an application in order to obtain any financial support.

### *Can spousal support or costs awards be used as compensation for financial abuse?*

In most cases, financial abuse is canvassed in relation to parenting disputes, which makes sense given where the concept of "family violence" has been inserted into the *Divorce Act*. Accordingly, there has been no relief granted by Canadian courts

specifically in relation to the findings of family violence, let alone financial abuse specifically.

This begs the question, *now what*? Legislature has introduced this concept of "family violence" and done so in an intentionally broad way, and yet courts do not appear to indicate that they have the latitude to compensate victims who successfully establish the presence of family violence.

*Spousal support*

Using spousal support awards as an indirect away to achieve compensation for financial abuse may not be sufficient.

On the one hand, courts can turn to the *Divorce Act* and consider whether family violence ought to be a relevant factor in determining spousal support. Section 15.2(6) does provide that one of the objectives of orders for spousal support is to recognize any economic advantages or disadvantages to the spouses arising from marriage or its breakdown.

However, there are a significant limitations in using this methodology.

Some individuals may not have entitlement to spousal support (for example a relationship of less than 3 years) but still incur financial abuse that requires compensation.

Other individuals may be entitled to spousal support but may be limited to the amount and duration based on various factors unrelated to financial abuse. These factors include the parties' relative incomes, the duration of the relationship, s.7 expenses, etc.

Also, spousal support awards include clauses for material change of circumstances. This means that after a year or so if the payer "loses" their job, they can bring the recipient of the support back to court "legitimately" and claim that support needs to

be reduced. This can start the cycle of financial abuse yet again with more than one iteration.

Therefore, spousal support may be useful to a degree in certain circumstances, however, it does not appear to offer a reliable source of compensation to address financial abuse in general.

*Costs*

The granting of costs awards is another way in which courts can acknowledge and compensate for incidents of financial abuse.

However, there are still several challenges for litigants to obtain costs for a finding of financial abuse.

A litigant would only be able to make financial abuse claims once the trial had completed. Therefore, the cost submissions would be the first time that a judge would have notice that a litigant is connecting certain facts of the case with a claim for monetary compensation. This then requires the defendant to counter the claims but in a backward-looking fashion at evidence already before the court. This method may limit the claimant's ability to fully flesh out the facts and also limit the defendant's ability to defend against the claims.

Also, cost submissions would likely not be the best venue in which to advance financial abuse claims, as a party's ability to present their case would be limited. These limitations include a confined number of pages in cost submissions, an inability to cross-examine claims made after the end of trial, etc.

A further limitation is the nature of the cost award itself. The award in general relies on the successful party having spent money on lawyers first before being compensated for that expense. Therefore, if an unreasonable litigant that has financially abused the claimant before the start of litigation, that litigant's cost obligation may not sufficiently cover the abuse itself.

At their best, cost awards can help replenish the financial resources that parties have expended due to abusive litigation practices. However, they do little to address the emotional toll that financially abusive litigation can take on parties or compensate parties for the abuse predating trial.

### *A proposal for the tort of financial abuse*

In light of the limited ability of judges to address financial abuse as discussed above, there appears to be a need for a separate tort that can more reliably address the issue.

The following represents an attempt to codify the elements of the tort of financial abuse, describe the key features with examples and discuss possible damages to be awarded depending on the level of abuse.

Elements of the tort of financial abuse

Put simply, the required elements of a financial abuse tort could be as follows:

> *One who, directly or indirectly, intentionally inflicts financial harm or distress to a spouse or former spouse is subject to liability to the other, if the harm or distress would be highly offensive to a reasonable person.*

The key features of this cause of action would be that

1) the defendant's conduct must be intentional or reckless;
2) the defendant must have negatively affected, without reasonable justification, the plaintiff's financial circumstances; and
3) a reasonable person would regard the negative affect on the plaintiff's financial circumstances as highly offensive causing distress or anguish.

A claim for financial abuse will arise only for deliberate and significant harm or distress. Claims from individuals who are sensitive to certain financial family dynamics or typical expenses of family law litigation are excluded.

Highly offensive harm or distress, as viewed objectively on the reasonable person standard, will include but not be limited to:

- oppressive financial control during the parties' relationship;
- non-payment of child or spousal support while having the means to do so;
- delaying production of financial disclosure that is readily available; and,
- behaving in bad faith during litigation.

If an element is made out as listed above, the defendant may rebut the claim if they can show that there was a reasonable explanation for the event in question. For example, a defendant may show that their spouse was recklessly depleting family finances through spending on drugs, alcohol or gambling and thus they required some financial control during the relationship for the financial security of the family. Or, there may be legitimate reasons for not paying child support, as in the case of having to pay for necessary family home expenses instead.

Specific examples of financial abuse

The following is a non-exhaustive list of actions that may be considered as financial abuse:

1. controlling family finances;
2. demanding to withdraw money from a personal account;
3. sabotaging employment or educational opportunities;
4. depleting family resources;
5. refusing or delaying paying child or spousal support;
6. sabotaging possibilities to receive social assistance;
7. intimidating or financially draining the other party;
8. dissipating and/or not disclosing assets;
9. failing to disclose or delaying in disclosing documents; and,
10. not following court rules or orders.

Damages

When assessing damages in financial abuse cases, a court would be looking for pecuniary and non-pecuniary losses to the claimant.

The claimant can incur emotional harm or distress as a result of the financial abuse of the defendant. The case of *Jones v. Tsige* (2012 ONCA 32) provides a list of cases where varying levels of non-pecuniary damages were awarded, with $500 being the lowest and $20,000 being the highest.

In *Jones*, the Court of Appeal listed a number of considerations when awarding damages, which could represent such considerations in the financial abuse context:

a) the nature, incidence and occasion of the act or conduct constituting the harm or distress of that spouse;
b) the effect of the financial abuse on the health, welfare, social, business or financial position of that spouse or their family;
c) factors of the relationship between the spouses to the action;
d) any harm, distress or humiliation suffered by that spouse or their family arising from the financial abuse; and
e) the conduct of that spouse and the defendant, both before and after the commission of the financial abuse, including any apology or offer of amends made by the defendant.

As noted in *Jones*, the court should also have a wide discretion in awarding damages which would include the possibility of aggravating and punitive factors depending on the degree and extent of the behaviour in question. For example, there should be a difference between damages awarded as a result of one or two isolated incidents of financial abuse versus those awarded for years of abuse being inflicted. As in general family violence cases, financial control can also occur coercively and repeatedly.

***Conclusion***

Financial abuse has been around in matrimonial cases since the beginning of family law.

Spouses with a financial advantage have abused that advantage when they are able to and, for the most part, with impunity.

Judges have attempted to curtail this behaviour through increased spousal support awards or cost rulings; however, the full effect of the financial abuse rarely gets compensated.

Financially abusive tactics before and after separation vary and are not clearly defined. This lack of uniformity of description makes it hard for judges to consolidate let alone categorize behaviours when attempting to punish the appropriate individual.

Therefore, the proposed tort of financial abuse is a rudimentary attempt to start the conversation about what such a tort could look like in the context of family law cases.

The tort proposed above has a definition, a list of elements, examples and also factors to assess damages.

Providing this framework would provide litigants with notice of the implications of such behaviour and the consequences that would arise if the required elements of the tort are met.

The financial abuse tort claim would be part of the list of claims that form court applications, and therefore litigants would not have to wait until they are arguing costs to raise their abuse. This way, the significance of the abuse would be at the forefront of family law matters and not be relegated to the 'back of the line'

The more that financial abuse and family violence topics are discussed in the normal course of family law litigation, the more pause individuals may take before behaving

in such manner. The elements would be clear and the financial consequences even clearer.

Just like increasing the cost of a grocery bag from 10¢ to 35¢ changed the behaviour of many shoppers, incentivizing them to bring their own bag; increasing the financial consequences of deleterious behaviour in litigation may hopefully have similar effects.

A simple proposal of a financial abuse tort will not be sufficient: Just like any shift in the law, change will require further discussion and iterations to the initial proposal before a final version can be implemented.

But without an initial proposal, the status quo will likely remain and financial abuses in family law will continue without sufficient means to stop them or compensate for their harm.

### *Contact orders and extended family: when will the court intervene?*

Christina Hinds

#### *Overview*

This article will focus on extended family contact orders and the recent decision of *M.M. v. K.M.* (2023 ONCJ 314). In *M.M.*, the maternal aunt, maternal uncle, and maternal grandmother ("the applicants") sought an order for regular in-person contact with a 9-year-old child. The child's father and the paternal grandparents ("the respondents") opposed the application.

Justice Paull granted the extended family access, reaffirmed the leading decision of *Chapman v. Chapman* (2001 ONCA) and reviewed the most recent and applicable case law including with *Giansante v. DiChiara* (2005 ONSC), *Torabi v. Patterson* (2016 ONSC), *McLaughlin v. Huehn* (2018 ONCA) and *Simmons v. Simmons*, (2016 NSCA). Paull J. also summarized a helpful list of ten factors that have been articulated in the case law as basic principles with respect to the best interests test.

#### *Introduction*

*M.M. v. K.M.* was an interesting decision where a father seemed to have unreasonably taken advantage of his parental right to determine who gets contact with his daughter. The father also did not use his best judgment when he had an opportunity to put the breaks on his own parent's animosity towards the deceased mother's family members.

To better understand the basis of the court's ultimate decision, we start with section 21(3) of the *Children's Law Reform Act* ("*CLRA*") *that* states the following:

> any person other than the parent of a child, including a grandparent, may apply to a court for a parenting order respecting decision-making responsibility with respect to the child.

While grandparents are specifically referenced in the *CLRA*, there is no special standing afforded to grandparents. In *Hinrichsen v. Regimbald* et al. (2021 ONSC 7503), Justice Fraser clarified that while "…the love, affection and emotional ties between the child and grandparent is a factor to be taken into account in considering the child's best interests, the amendments have been found to simply further articulate the class of persons who may seek an order for contact. It does not extend their rights or give them any special standing." (at para. 21)

**Facts of *M.M. v. K.M.***

The salient facts of *M.M. v. K.M.* are as follows:

- The child was born in 2014.
- In 2015, the mother and father moved from Kingston to Vaughan to live with the maternal grandparents. The grandmother assisted in providing primary care for the child, and the maternal aunt and uncle lived close by, seeing the child on a regular basis.
- At the end of 2015, the mother was diagnosed with terminal cancer. After the mother's diagnosis, the father was largely unavailable to care for the child.
- The mother passed away in 2017. After the mother's death, the father moved to Toronto, leaving the child with the maternal grandparents. About a month later, the father moved with the child to Napanee (more than 200 kilometers away) to live with his parents.
- In 2019, the father ended all contact between the child and the maternal aunt and uncle. In 2021, the father ended all in-person contact between the child and the maternal grandparents but permitted weekly video calls, albeit short and tightly controlled.
- The maternal family issued an application seeking regular in-person contact.

The parties' positions can be summarized as follows:

a. The applicants claimed that they shared a close and loving relationship with the child prior to the mother's death and that relationship had been "unreasonably curtailed" by the decisions of the father and paternal grandparents.

b. The respondents argued that the father, as the sole-decision-making parent, was entitled to deference with respect to such decisions and that he had acted reasonably in terminating/restricting contact. The respondents alleged that (i)

the applicants had not properly supervised the child while she was in their care and that she had been sexually abused by her cousins and (ii) the aunt was seeking to alienate the father from the child. The concerns with respect to the child being sexually abused by her cousins were not verified by the Children's Aid Society.

## The Test for Extended Family Contact Orders

In *M.M. v. K.M.* Justice Paull reviewed the prominent decisions relating to grandparent access as outlined below.

Paull J. started off his legal summary by reaffirming that the leading case on contact with extended family members is *Champman v. Chapman* (2001 CanLII 24015 (ON CA)). At paragraph 19, Justice Abella, writing for the Ontario Court of Appeal, stated that relationships with grandparents and extended family can enhance the emotional well being of a child and when those relationships are "imperiled arbitrarily", the court may "intervene to protect the continuations of the benefit of the relationship".

In *Giansante v. Di Chiara* ([2005] O.J. No. 3184), Justice Nelson set out a three-part test based on the *Chapman* decision (with specific reference to grandparents):

1. Does a positive grandparent-grandchild relationship already exist?
2. Does the parent's decision imperil this relationship?
3. Has the parent acted arbitrarily? Deference to parents may not be as strong when one of the parents has died and that parent's family seeks contact.

In *Torabi v. Patterson* (2016 ONCJ 210) Justice Kurz considered what constitutes a "positive relationship" (at para. 74):

a. There must generally be a substantial pre-existing relationship between the relative and child. Strong loving and nurturing ties must exist between them based on time spent together that enhances the emotional well-being of the child.
b. That relationship must be a constructive one for the child in the sense that it is worth preserving. If relations between the parties are too poisoned, a previously positive relationship may not be capable of preservation.
c. The determination must include consideration of the age of the child and the time since the child last saw the relative.

d. A fourth factor may apply in the exceptional circumstance of a young child who has lost a parent. In that event, the existence of a strong pre-existing relationship may not be necessary when the relative(s) of the lost parent applies for access.

**Application of the Facts**

Justice Paull applied the three-part test in *Giansante* as follows:

1. **A positive relationship existed between the applicants and the child.** The applicants played a significant role in the child's life – the aunt and uncle saw the child on an almost daily basis and the grandmother provided primary care for a period of time. There were several photographs illustrating that the applicants were a "loving and close-knit family" and that the child "enjoys a comfortable and happy place in the family".

   Justice Paull then considered militating factors.

   With respect to the passage of time, Justice Paull considered the OCL [Office of the Children's Lawyer] clinician's observations that the child identified with her connections to the applicants and ultimately found that "the significant nature of the pre-existing relationship" although diminished by the passage of time", is nonetheless significant and one worth preserving" (at para. 122).

   With respect to acrimony, it is not in a child's best interests to be placed in circumstances of real conflict. Justice Paull considered that the applicants merely sought contact with the child – they have never sough primary residence of involvement in decision-making and "it is possible that contact arrangements for the applicants can proceed without conflict." (at para. 126)

   Justice Paull held that even if he was wrong with respect to the finding that there was a strong relationship, this was a case where such a finding is unnecessary, as the mother passed away when the child was three years old, the child has no siblings, and the applicants represent her only connection that she will have to her mother (at paras. 128 & 129).

2. **The father's decisions imperilled the relationship between the child and the applicants.** There was no question that the father had imperilled the relationship. The aunt and uncle went from seeing the child on a daily basis to not seeing the child at all. The grandmother went from living with and providing primary care to the child to having only short, tightly controlled video calls with the child once a week (at para. 131).

3. **The father acted arbitrarily.** A finding that a strong relationship has been imperilled does not necessarily lead to a finding that that it has been done so arbitrarily. However, as the court did not accept the father's stated concerns as discussed above, Justice Paull determined that the father acted arbitrarily (at paras. 135, 136 – 139).

*As Always, Best Interests*

Once the above test was satisfied, the court determined whether an order for contact was in the best interests of the child. Justice Paull determined that contact between the applicants and the child was in the best interests of the child, including that (at para. 141):

a. The child enjoys a strong and stable bond with her father and an order for contact with the applicants would not jeopardize that.
b. The child shares emotional ties with the applicants, despite the passage of time.
c. The applicants have a close knit and loving family and offer the child love, support and a stable place within it.
d. The child has lost her mother and the applicants can offer the child a connection to her mother.
e. The applicants can provide the child with a connection to her roots and history, and her Albanian culture that is reflected in the maternal side of the family.

## Conclusion

This article will focus on extended family contact orders and the recent decision of *M.M. v. K.M.* (2023 ONCJ 314). In *M.M.*, the maternal aunt, maternal uncle, and maternal grandmother ("the applicants") sought an order for regular in-person contact with a 9-year-old child. The child's father and the paternal grandparents ("the respondents") opposed the application.

Justice Paull granted the extended family access and also reviewed the most recent and applicable case law and reaffirmed the leading decision of *Chapman v. Chapman* (2001 ONCA) along with *Giansante v. DiChiara* (2005 ONSC), *Torabi v. Patterson* (2016 ONSC), *McLaughlin v. Huehn* (2018 ONCA) and *Simmons v. Simmons*, (2016 NSCA).

Paull J. also summarized a helpful list of ten factors that have been articulated in the case law as basic principles with respect to the best interest test.

Relationships between a child and extended family have the potential to bring great benefit into a child's life. If a parent's decisions have imperilled a positive relationship without good reason, the court may intervene to protect such relationships.

However, as confirmed by Justice Paull in M.M., grandparents do not have a legal right to access to grandkids. The test is always "best interests", and the court will not interfere with a parent's decisions on extended family contact unless it is satisfied that there has been a willful disregard to those interests (at paras. 102 & 114). The onus is on the extended family seeking contact to demonstrate that deference should not be given to the parents and that a contact order is in the child's best interests (at paras. 102 & 115).

Nonetheless, if one analyzes the facts of the case a bit closer, it appears that the nine-day trial in M.M. and total legal fees likely north of $100,000 could have been avoided.

The father in the case made improper sexual advances towards his deceased wife's sister before and after she died. After the sister reported these advances to her husband and the police, his approach towards the sister soured. This led to the start of him limiting her access to his daughter.

What made things worse were the father's own parents. In their apparent blind devotion to their son and granddaughter, they added fuel to the fire. They made baseless accusations against the maternal family and supported their son's misguided agenda.

What we can learn from this is that whatever role one plays in a family dynamic (parent, grandparent, aunt, cousin, etc.), that individual can either be a helpful or harmful factor in the ultimate outcome. The level of conflict may be avoided if family members can identify the injustice occurring and standup to it, rather than enabling it.

When the paternal grandparents saw their son acting unreasonably and harming the child's relationship with her extended family, they should have prioritized their grandchild's wellbeing instead of adding fuel to the fire. For example, they could have had a talk with their son and let him know that they do not support his actions.

If it was the the paternal grandparents that initiated the harmful behaviour, the father should have filtered out their accusations and critically analysed them rather than accepting them blindly.

Overall, the lesson here is that each family member can play an important role in a child's life. And for a parent to diminish that role, they need good reasons and clean hands.

## *Notional disposition costs: what are they good for? Absolutely something.*

Amruta Ponkshe

### *Overview*

There is little doubt that family lawyers in Ontario require a comprehensive understanding of financial disclosure and equalization of net family property. And counsel who routinely prepare financial statements (myself included) will appreciate that notional disposition costs can significantly affect a net family property calculation.

So, what are these costs exactly? How does recent case law guide us in applying them and at what percentage should they be applied?

The aim of this article is to answer these questions.

### *What are Notional Disposition Costs?*

There are several disposition costs associated with the sale of assets. These costs include taxes, legal fees and commission, and other similar types of costs that are triggered by a sale.

Selling a plot of land or a house triggers real estate commission and legal fees. Selling a rental property triggers capital gains tax. Cashing in a Registered Retirement Savings Plan (RRSP) triggers payment of income tax on the proceeds. The list goes on. And such costs reduce the balance of proceeds that a client receives from the sale of an asset which ultimately affects the client's Net Family Property (NFP).

### *Legislation and Jurisprudence*

Before we get down to the nitty-gritty of disposition costs, it may be worthwhile to discuss their legislative and common-law basis.

In the context of discussing notional disposition costs, the Ontario Court of Appeal in *Berta v. Berta* (2015 ONCA 918) reiterated that section 4(1.1) of the *Family Law Act* stipulates that specified liabilities to be deducted from a spouse's NFP include "any applicable contingent tax liabilities in respect of the property".

In *Sengmueller v. Sengmueller* (1994 CanLII 8711 (ON CA)), the Ontario Court of Appeal established that "while these costs are not liabilities, in the balance sheet sense of the word, they are amounts which the owner will be obliged to satisfy at the time of disposition, and hence, are ultimately liabilities inextricably attached to the assets themselves".

In *Sengmueller*, the Court, based on an analysis of *McPherson v. McPherson* (1988 CanLII 4732 (ON CA)) "gleaned" three rules that apply in all cases where notional disposition costs may be associated:

1. apply the overriding principle of fairness, i.e., that costs of disposition as well as benefits should be shared equally;
2. deal with each case on its own facts, considering the nature of the assets involved, evidence as to the probable timing of their disposition, and the probable tax and other costs of disposition at that time, discounted as of valuation day; and
3. deduct disposition costs before arriving at the equalization payment, except in the situation where "it is not clear, if ever" there will be a realization of the property.

### *Criteria for Deduction*

In *Bortnikov v. Rakitova* (2016 ONCA 427), the Ontario Court of Appeal provided a guide to applying notional disposition costs:

> As a general rule, in determining whether disposition costs should be deducted from an asset's value, **the analysis should take into account evidence of the probable timing of the asset's disposition**. It is appropriate to deduct disposition costs from net family property "if there is satisfactory evidence of a likely disposition date and if it is clear that such costs will be inevitable when the owner disposes of the assets or is deemed to have disposed of them": *Sengmueller v. Sengmueller* (1994), 1994 CanLII 8711 (ON CA), 17 O.R. (3d) 208 (C.A.), at pp. 216-17. An allowance for disposition costs from net family property should not be made in the case "where it is not clear when, if ever, a sale

> or transfer of property will be made": *McPherson v. McPherson* (1988), 1988 CanLII 4732 (ON CA), 63 O.R. (2d) 641 (C.A.), at p. 647. However, it is not necessary for the court to determine whether the disposition of the assets is inevitable; rather, the court should determine on the basis of the evidence whether it is more likely than not that the assets would be sold, at which point disposition costs would inevitably be incurred: *Buttar v. Buttar*, 2013 ONCA 517, at para. 20. (emphasis added)

Further, as pointed out by Justice Kimmel in *Oudeh v. Prior-Oudeh* (2021 ONSC 3718), where there is only speculative evidence of a sale, it may be appropriate to discount the notional costs of a sale of property. For example, in *Baiu v. Baiu* (2014 ONSC 216), Justice Gilmore did not find that the sale of the former matrimonial home was speculative to the point where disposition costs could be ignored. Although the sale was some years away, the intention of the respondent was to sell it when the children had completed their high school education. The court accepted this evidence and found that it was "reasonable to apply a reduced disposition cost to the matrimonial home at the rate of 2.5%".

We can thus deduce three general principles to follow in determining whether disposition costs should be deducted from an asset's value, based on the above case law:

1. When a sale is inevitable – **deduct the full cost**
2. If it is not clear when, if ever, a sale will be made – **do not deduct the cost**
3. When a sale will occur at some point between the immediate present and the distant future – **deduct a discounted cost**

Below is a further discussion of how judges in Ontario have applied these rules to cases involving notional disposition costs.

<u>No deduction applicable</u>

A prominent case where notional disposition costs were not deducted is *Berta v. Berta* (discussed above). In this case, one of the issues before the Ontario Court of Appeal was whether the trial judge had erred in assigning a nil value to the notional disposition costs of each of the wife's and the husband's corporate shares. In support of the wife's argument that the trial judge erred by failing to value her share disposition

costs at $384,884, she submitted that the sale of her shares was imminent as of the 2010 valuation date and she relied on undisputed evidence of the husband's 2012 purchase of the wife's shares for $2.2 million.

The Court of Appeal stated that the relevant inquiry was not what reasonable share disposition costs should have been assigned to the wife's shares at the time of the 2012 share transaction but, rather, whether there was a reasonable likelihood at the valuation date that the wife would sell her shares and, if so, at what reasonable estimated value.

The trial judge found that, as of the valuation date, the wife's sale of her shares was contemplated only as part of the parties' proposed joint sale of the business to a third party. This sale had ultimately collapsed. Consequently, the Court of Appeal saw no basis to interfere with this aspect of the trial judge's NFP calculation.

Discounted deduction

In *Oudeh v. Prior-Oudeh* (discussed above), it was entirely speculative as to whether the applicant would have to sell the matrimonial home or find some other means of financing the equalization payment he owed. Justice Kimmel found that, in such circumstances, it was fair and equitable to allow some deduction of notional disposition or financial costs and that the precise cost need not be determined. In exercise of her discretion, Justice Kimmel set the notional cost at 2.5% of the separation date value of the matrimonial home, as opposed to the 5% that was sought.

In *Fielding v. Fielding* (2014 ONSC 2272), notional disposition costs were allowed even though no evidence was led about an intention to sell. The court was not presented with any evidence by the wife of a present intention to sell the cottage; however, the court also accepted the reality that it would be sold at some point – whether it was actually disposed of, or whether there was a deemed disposition of it on the wife's death. The court noted that the wife was in late middle age and recognized that her eventual death was "hardly remote". Notional disposition costs of 5% were not permitted, since disposition was likely not for some time, but the court found that a deduction of notional

disposition costs at 2% would be a "reasonable figure to represent a deferral of those costs to a future date".

***Recent case law discussing notional disposition costs***

*Daciuk v. Daciuk*

In *Daciuk v. Daciuk* (2023 ONSC 70), Justice Kurz was presented with an NFP statement that excluded the notional disposition costs for the parties' matrimonial home. After analysing the parties' finances and reviewing the evidence before him, Kurz J. concluded that it was most likely that the matrimonial home would have to be sold to pay the equalization payment and support awards that he granted to the applicant. In those circumstances, the court reasoned that it was open for them to include notional costs of disposition.

Accordingly, Justice Kurz deducted 5% notional disposition costs from the value attributed to the matrimonial home and $1,000 as notional costs of legal fees for the sale.

*Alexander v. Gensberger*

In *Alexander v. Gensberger* (2023 ONSC 904), the applicant wife applied notional disposition costs to her RRSPs and investment accounts at the rate of 21% for the valuation date and the date of marriage. The respondent husband did not apply any notional disposition costs to his RRSPs and investment accounts.

Justice Kraft discussed the three rules laid down in *Sengmueller* (discussed above) and reiterated Justice Jarvis' approach in *Virc v. Blair* (2016 ONSC 49) that in order to determine the appropriate notional RRSP tax rates – where the parties disagree – the court's analysis must rely on evidence supporting the expected time of disposition. And, if the evidence is lacking, "the court may consider both agreed upon rates for other assets as well as hindsight evidence of post-separation [tax] rates and actual disposition costs incurred upon sale of RRSPs".

Since neither party adduced any evidence as to the correct tax rate, Justice Kraft accepted the applicant wife's 21% tax rate and applied the same rate to the respondent husband's investment accounts.

### *Common Disposition Costs*

Costs associated with sale of land or real estate property

The common costs associated with the sale of land and real estate properties are real estate commission and legal fees. In *Oudeh v. Prior-Oudeh (*discussed above), the court stated that it can take judicial notice that "a typical real estate commission for a vendor to pay in Toronto is 5% and presumably (t)he (husband) would like the court to infer that there will be some modest real estate transactional legal fees".

Investments/RRSPs

In *Sengmueller*, the Court of Appeal established that RRSPs, in particular, are taxable in full, regardless of the time of realization, whether they are cashed in total, or taken by way of annuity.

However, there is no consistency in how courts have approached determining notional costs for RRSPs. As pointed out in *Virc v. Blair* (discussed above), one authority's review of the case law observed that "in cases where deduction is allowed, the rate of deduction varies anywhere from 15 per cent to 30 per cent. No one percentage appears to be more common than another in the case law…".

In *Taylor v. Marshall* (2016 ONSC 4547), the wife sought to have a notional disposition rate of 30% for her RRSPs. The husband took the position that the notional disposition rate should be 18%, as her income was low. As there was no expert evidence on this point, Justice Miller found that a reasonable notional disposition rate for the RRSPs was 20%, taking into account the wife's income level. However, in *Taylor*, the court did not

explain on what basis 20% was chosen and thus the determination appeared to be arbitrary.

In *Townshend v. Townshend* (2010 ONSC 6405), Justice Kruzick found that notional disposition costs take into account a number of factors, most importantly the age of the parties. His Honour stated that courts routinely discount RRSPs at 25%.

In *C.Z. v. J.Y.* (2021 ONSC 256), the husband requested that the notional disposition costs in respect of his RRSPs be at a rate of 35%. The wife took the position that the applicable tax rate for each of them was 25%. The husband relied on a decision that used 33.7% as the tax rate. However, Justice Himel noted that the evidence in the relied upon decision to support 33.7% came in the form of an expert's report. The husband in *C.Z. v. J.Y.* did not produce any expert evidence.

Justice Himel further reasoned as follows:

> While the husband identifies that he plans to withdraw his RRSPs within 10 years after his retirement he provides no retirement date, nor any evidence of any retirement plans as of the date of separation. I am unprepared to make any finding about his retirement or his intentions respecting his RRSPs.
>
> The husband testified that he focuses on growing his investments and avoids dissipating same. He states that if he disposes of the assets at one time the disposition rate would be as high as 50%.
>
> I accept the wife's argument that there is no evidence to suggest that the husband will have to collapse his RRSPs "all at once", and no evidence that he contemplated same on the date of separation. At that time the husband was 45 years of age. Given the significant savings he has amassed in other vehicles (TFSAs, investment accounts, etc.), as well as the efforts he has undertaken to ensure tax efficiency (i.e., by maintaining investment loans to allow the ongoing deduction of carrying costs), the evidence suggests he will likely withdraw funds from his RRSPs gradually and in a manner that limits his tax burden as much as possible.
>
> In *Townshend v. Townshend*, Kruzick J. found that notional disposition costs take into account a number of factors, most importantly the age of the parties. Courts routinely discount RRSPs by 25%.
>
> …
>
> I accept that 25% is an appropriate rate for each of the parties in the absence of expert evidence on the notional disposition costs.

Sometimes courts do not provide an explanation as to why a certain notional disposition cost was used over another. For example, in *S. v. S*. (2023 ONSC 882), Justice Pinto accepted 30% as the disposition cost for joint investments of the parties. The court did not offer any reasoning for the figure. However, it may have been because the investments were joint and thus any change in the percentage would have affected the parties equally.

On the other hand, courts can be quite specific in requiring proof before accepting certain disposition cost estimates. This occurred in *Noble v. Curveira* (2023 ONSC 1211) where the husband proposed 20% as a notional disposition cost to his RBC shares. The court did not allow any deduction reasoning as follows:

> The respondent claims 20% for notional costs of disposition for his RBC shares.
>
> I know that realizing on registered accounts runs into withholding taxes and can incur significant costs depending on the terms of the accounts. So, with the parties pennies apart on the notional costs of the registered accounts, I accepted the respondent's estimate as reasonable.
>
> But I do not understand why the same 20% estimate would apply to notional disposition costs of the respondent's RBC shares. They are just shares in his name. There may be broker commission I suppose. But I have no idea of what, if any, tax consequence there may be on the disposition. With the respondent's line 150 income for the past two years being very modest indeed, the likely outcome of the taxation of any capital gains on the shares (if any) needs proof by evidence. I cannot just accept an arbitrary number that is not agreed by the applicant without any evidence or justification.
>
> Accordingly, I find that the notional costs of disposition of the LIRA and RRSP are properly claimed at $21,024.74. I find that the respondent did not prove any notional disposition costs for his RBC shares.

Pensions

Courts have noted that while determining disposition costs for pensions, a reliance on evidence is preferable. In *Lambert v. Peachman* (2017 ONSC 7450), Justice Woodley stated that pensions are contingent interests, and consequently the court examines what was "reasonably foreseeable on the valuation date".

In *Kruschenske v. Kruschenske* (2018 ONSC 4342), Justice Cane assessed the wife's retirement age and the factors that contributed towards an early retirement versus a later retirement. The court also had the benefit of an expert report from Guy Martel. Justice Cane concluded that the appropriate tax liability rate to be applied for the parties' pensions was 19%.

In *Meffe v. Meffe* (2023 ONSC 3195), the wife hired an expert to determine the notional disposition costs with respect to her Ontario Teacher's Pension Plan. In his report, the expert took into consideration the following assumptions:

(1) retirement age of 65,
(2) life expectancy of 80,
(3) wife would withdraw from her pension in equal amounts each year, and
(4) the withdrawals would be subject to an effective tax rate of 25% to 30%.

The expert proposed a mid-point between the two percentages which the court accepted.

The lesson in *Meffe* appears to be that for any report that is used, counsel should review the assumptions that are being relied on and ensure that they are consistent with the facts.

Other types of disposition costs

Other disposition costs include (a) capital gains tax, (b) taxes associated with a capital gain in the cash surrender value of a life insurance policy, and (c) costs for transfer of interest in a business/corporation, among others.

***Practical Tips***

- Notional costs of disposition are generally listed under Part 5: Debts and Other Liabilities of the Form 13.1 Financial Statement. However, we find it more convenient to list them immediately below the asset to which they relate. If you

prefer this approach, don't forget to list the value in brackets so that it will be deducted from the total value of assets.

- Disposition costs should generally be included for all relevant dates: the date of marriage, the date of separation, as well as the "today's date" column in the Financial Statement.
- Creating an Excel spreadsheet to calculate dispositions costs is an effective way to ensure accuracy of the calculations as well as to provide a reference if the calculations need to be explained, verified or adjusted.
- Hiring an expert is a relatively inexpensive process and can cost as little as $500 for a notational disposition cost report. We have used Guy Martel and his prices are reasonable and his turnaround time continues to be impeccable.

## *Navigating parental alienation in family law: guiding principles, evidence & remedies*

Samantha Rich

### Overview

Parental alienation is a complex phenomenon that arises in family law litigation proceedings, often occurring during high-conflict divorces or litigation involving parenting arrangements. Parental alienation can be found in family law cases where a child resists or rejects one parent in a disproportionate manner and does so seemingly without convincing reason, in the context of the previous parent-child relationship, as defined by leading jurisprudence on parental alienation. This article reviews recent cases relating to parental alienation and delves into the guiding principles, the role of expert evidence, and the remedies the courts have tailored to address findings of parental alienation.

### What is Parental Alienation?

In simple language, parental alienation is a process where one parent's role is systematically eroded over time through a variety of maneuvers by the other parent (*Farrell-Wadden v. Mombourquette*, 2023 NSSC 164).

Parental alienation has also been described as "a child's strong resistance or rejection of a parent that is disproportionate to that parent's behaviour and out of sync with the previous parent-child relationship" *(Ciarlariello v. Iuele-Ciarlariello*, 2014 ONSC 5097 at para. 3).

But at its core, parental alienation is also "the notion that the child's decision to refuse to have a relationship with the targeted parent is without justification or without convincing reason" (*K.F.M. v. K.G.T.*, 2023 BCSC 1347 at para. 259).

**Guiding Principles of Parental Alienation**

In *J.C. v. R.P.* (2022 ONSC 2751 at para. 15), in discussing the guiding principles of parental alienation, Justice Broad cited the British Columbia Court of Appeal decision of *Williamson v. Williamson* (2016 BCCA 87, paras 39-43):

a) alienation can occur as an **unfortunate side-effect of the breakdown of a relationship**, but can also occur because of **deliberate actions, both direct and indirect, on the part of a parent**;

b) **the reasons for a child's decision to refuse to have a relationship with a parent need to be assessed with the particular personality and experience of the child involved**. What may seem a thin or unconvincing rationale for one child may have a much more convincing force in the context of the personality and experience of another child;

c) parental alienation **must be distinguished from estrangement**. The difference lies in the cause; estrangement occurs when the child understandably refuses contact with a parent because of that parent's behaviour, and there is a logical and rational reason for the child's rejection of the parent. In the case of alienation, it is said there is little or no objectively reasonable cause for the child's rejection of the parent;

d) **if a court finds a parent "guilty" of alienation, that finding does not pre-determine one particular remedy**. Determining an appropriate response once a finding of alienation is made is an extremely important process since it can have an impact on both the short, and long term, well-being of the child involved;

e) the legal responses to alienation will vary based upon case-specific enquiries. **One response may be Court-ordered therapeutic intervention** where appropriate, while recognizing "force-marching" a child to reunification may, in some cases, be unrealistic and harmful;

f) **the age of the child is relevant in determining the appropriate response to alienation**. Once the child becomes a teenager, it appears that remedial options become increasingly limited; and

g) **the only consideration in determining what particular remedy is appropriate in an individual case is the best interests of the child**. It is important to consider the child's best interest in both the short term and long term. (emphasis added)

These principles offer valuable insight and guidance into how courts approach cases involving parental alienation. They also emphasize the importance of tailoring remedies to the particular circumstances of each child and the family situation.

Additionally, it is important not to be constrained in an all-or-nothing approach. For example, just because one parent may claim parental alienation and the other claims estrangement, it does not mean that the court has to make a finding of one or the other.

For example, in *K.F.M. v. K.G.T.* (2023 BCSC 1347), the parents presented a lot of evidence for their diametrical positions on parental alienation. Nonetheless, at paragraphs 260 to 264 Justice Brundrett took a softer approach with the following findings:

> I find that the claimant has not established K's unjustified rejection of him at anything close to a degree that would impact my assessment of the best interest factors as they relate to the allocation of parenting responsibility and parenting time. Rather, **there are multiple interacting factors at play in the resist-refusal response of K that have contributed to the breakdown of the father-son relationship**.
>
> Further, K appears to have adopted his own moral views about the claimant, and in several respects those views do not align with the respondent's views. Fault for that circumstance, assuming such a consideration is relevant, does not lie solely or even substantially with the respondent, and **there are elements of estrangement at play in K's context**. I find that **occasional poor parenting, and the claimant's adversarial focus** (as evidenced by his recording practices) **has itself led to disruption in the father-son attachment**. I also find that the claimant's focus on parental alienation risks putting the pursuit of principle over intrinsic enjoyment of the parent-son relationship, making the child feel safe, and nurturing his development.
>
> The **facts in this case do not lend themselves to a clear finding one way or the other with respect to parental alienation or unjustified estrangement**. I therefore find it **unhelpful in this particular case to focus on who is to blame** for the breakdown in K's relationship with his father. I would **focus instead on a**

> **child-centered approach and the fundamental consideration of best interest factors** …
>
> **I would therefore reject an approach in this case that adopts alienation as a legal conclusion that places blame on one parent for disruption in the parent-child relationship**. I do recognize that there is a pattern of resistance and refusal behaviour by K toward the claimant, that the child is aligned with the respondent, and that he appears to have sometimes expressed disproportionate hostility toward the claimant without reasonable justification. I also recognize that the parenting regime has sometimes operated unfairly for the claimant, like when he was falsely accused of assault and lost his contact with the child for several months. However, as noted, there are a multitude of factors at play, and the best focus is on K's long-term interests.
>
> I find in this case that **a careful assessment of the context and the characteristics involved in the best interests of the child is called for to determine the parenting issues here**, **rather than a judicial finding assigning blame for the attachment disruption -- a finding that is only likely to lead to further litigation and conflict**. (emphasis added)

*J.I. v. A.A.* (2023 ONSC 2942) is another recent alienation case. In *J.I.*, the father claimed that the mother was alienating the children from him. Justice Fryer took a more holistic approach and determined that the children's circumstances were much more complex and the relationship breakdown was not simply due to parental alienation. The Court held that this was not a case of parental alienation, despite the mother engaging in alienating behaviours. Rather, the children's rejection of their father appeared to have been more rooted in their need to shield themselves from the "unabating conflict between their parents".

Therefore, parental alienation is an issue that should be guided by principles, but not so beholden to them as to overlook the more appropriate explanation for a child's relationship to a parent.

**Is expert evidence required in parental alienation cases?**

In the case of *Williamson v. Williamson* (2016 BCCA 87 at paras. 47-48), Justice Stromberg-Stein found that because the parties disputed the existence and cause of the parental alienation, the parental alienation should be proved and supported with admissible expert evidence. Justice Stromberg-Stein held that, "[p]roof of such a serious allegation requires proper expert evidence to support a finding of alienation on the part of either party and to support that the [Family Reflections Reunification Program] was in the best interests of the children".

In *Testani v. Haughton* (2016 ONSC 5827), Jarvis J. also held that, "There must be compelling evidence that the therapy will be beneficial".

Justice Papageorgiou, in the case of *Stavropoulos v. Stavropoulos* (2021 ONSC 5753 at para. 23), added the following:

> **Although it may not be required in every case, given the contested record before me and the weak evidence of alienation**, **it is significant that Tomy has not provided any expert evidence or other persuasive evidence to demonstrate that there is alienation** on the part of Betty. At the most, I have before me competing and contradictory affidavits from Tomy and Betty which have not been tested by cross-examination. In this case, **in the absence of expert evidence, "there is no more reason to find alienation on the part of [Betty] than there is to find estrangement arising out of [Tomy's] conduct towards [Betty] and the children** …" (emphasis added)

In *Barrett v. Huver* (2018 ONSC 2322 at paras. 17-18), Justice Shaw held that, given the lack of expert evidence, he was not able to make a finding of parental alienation.

> **It is impossible for me to determine on the competing, contradictory affidavits, untested by cross-examination**, and **in the absence of any expert evidence**, **the reason or reasons for the fractured relationship** between Mr. Huver and Cohen, and the apparently deteriorating relationship between Mr. Huver and Ryah.
>
> On the material before me, **there is no more reason to find alienation on the part of Ms. Barrett than there is to find estrangement** arising out of Mr. Hover's conduct towards Ms. Barrett and the children. (emphasis added)

In the case of *A.M. v. C.H.* (2018 ONSC 6472 at para. 17), Nickolson J. noted that "[p]arental alienation is a legal concept as opposed to a mental health diagnosis. As such, it is my view that **the court can make a finding of alienation based upon an analysis of the facts alone without expert evidence**". (emphasis added)

Still, a parent's bald accusations of parental alienation without any reasonable justification will likely have adverse legal implications for their case and therefore making such accusations is not advisable. For example, in *Sadikali v. Sadikali* (2023 ONSC 4639), the father claimed "violence against himself in the form of parental alienation" including that the mother's "mental instability" was affecting the family and that the children were suffering from trauma. Justice Fowler Byrne held that the father's demand for enforcing alienation therapy without any evidence and him being not willing to consider any other scenario was not meeting the needs of the children.

Moreover, a court may agree that expert evidence is not necessary but still find an adverse inference against the parent that did not obtain it if the evidence was available. This point was alluded to in *Hermilo's v. Toshani-Levine* (2023 ONSC 4120 at para. 29) where Justice Smith, at a motion, held the following:

> **Although expert evidence about parental alienation is not necessary**, **the Father nonetheless had the opportunity to participate in a parenting assessment, where his allegations of parental alienation could have been fully explored**. However, **he refused**. On September 13, 2019, on consent, Audet J. ordered that the Father provide the names of three qualified assessors to conduct an assessment. The Father proposed three social workers to the Mother, all of whom were acceptable to her. Counsel for the Mother advised the Father that he reached out to the proposed assessors and obtained information regarding their availability and associated costs. The Father inappropriately objected to counsel's actions of contacting the proposed assessors. As a result, the Father decided that he was then no longer interested in pursuing an assessment. **Had the Father been truly concerned with parental alienation, as alleged, the Court believes that he would have proceeded with the court ordered assessment**. (emphasis added)

Furthermore, when an expert opinion is relied upon, a court must assess the basis of the opinion very carefully. For example, in *R.E. v. S.J.L.* (2023 PESC 1 at paras. 50-52),

Justice Cann was not impressed with the expert and gave no weight to his opinion that parental alienation had occurred:

> **Expert opinions which are formed in part on the basis of factual assumptions lose validity if the factual assumptions prove unfounded**. Moreover, in a forensic context, **the decision to simply choose to accept a version of the truth**, especially in the face of concerns of parental alienation having been raised, **gives rise to concerns of a lack of objectivity of methodology** (to be contrasted with impartiality), **which substantially weakens the probative value of the opinion**.
>
> …
>
> For essentially the same reasons, I am unable to attach weight to the finding that A.'s diagnosed PTSD is attributable to violence, abuse, and neglect on the part of the father. Effectively the same unquestioning and uncritical methodology was employed to reach this conclusion as was the case regarding parental alienation.
>
> Further, **cross examination of Dr. Mallia regarding his qualifications in respect of assessing parental alienation concern me**. Independent of his approach to the information-gathering aspect, just discussed, I am able to attribute minimal weight to his conclusions… (emphasis added)

The above cases illustrate how the need for expert evidence with respect to parental alienation will depend on the circumstances of the case. Some judges will favour expert evidence to support a claim of parental alienation, while others will rely more on factual analysis. But at a minimum, judges should assess the very basis of the expert's opinion and ensure that their conclusions are reached with sound methodology and sufficient expertise.

**Is an interim motion appropriate to seek a remedy for parental alienation?**

Justice Broad in *J.C. v. R.P.* (referred to above) discussed whether an interim motion is appropriate to seek a remedy for parental alienation. He found that while there is authority for a court to make a finding of alienation and to order reunification therapy

on an interim motion, the threshold required to satisfy such a finding is high. That threshold was not met in *J.C.* as illustrated at paragraphs 63 to 66:

> There are admittedly troublesome aspects to certain of the statements in the text messages from the father and step-mother referred to in the mother's evidence. However, **they are not sufficient to satisfy the high threshold required to support a finding of parental alienation, particularly on an interim motion on a paper record**.
>
> The situation is complex and **the exact causes of the child's current rejection of the mother are far from clear** …
>
> **Based upon the conflicting evidence, it appears likely that the parents share responsibility for the breakdown in the relationship between the child and the mother**. The father may not sufficiently recognize the importance of the child maintaining a strong and healthy relationship with the mother and his responsibility to take positive steps to actively encourage it. On the other side, the mother may not recognize her own role in causing damage to the relationship through her conduct towards the child.
>
> **I am not satisfied on the record before the court that parental alienation on the part of the father has been proven** … (emphasis added)

In *Hazelton v. Forchuk* (2017 ONSC 2282 at para. 2), Justice Gray noted that where parental alienation is found, it is critical that it be addressed quickly on an interim motion:

> Regrettably, **there is no real alternative other than to deal with this issue by way of an interim motion**. If there is anything everyone agrees on, whether it be lawyers, experts or judges, **it is essential that a parental alienation case be dealt with quickly**. As a practical matter, **if it is to be dealt with quickly it must be resolved by way of a motion, long before trial**. That means, of course, that a judge must deal with the matter on the basis of a less-than-perfect record. As is usual, affidavits markedly conflict and there is no cross-examination. What emerges from the motion is an order that is likely to be final in many respects, in practical terms, while interlocutory in form. (emphasis added)

In *O.M. v. S.K.,* Justice Bell reaffirmed Justice Gray's position and held that:

> **A finding of parental alienation can be made at the interim stage** and **on a written record**, particularly **when the evidence overwhelmingly points to**

> **this conclusion**. The urgency raised by parental alienation necessitates early and decisive intervention by the court. (emphasis added) (2020 ONSC 3816 at para. 45)

However, at the interim stage, courts should be cautious of accepting the expert's opinion even with expert evidence. This was exemplified in *K.K. v. M.M.* (2022 ONCA 72) where, as a result of an incorrect interim decision, the mother had her children removed from her for six and a half years. In *K.K. v. M.M.*, the Court of Appeal dismissed the father's attempt to overturn the trial decision despite him having been initially successful in having interim custody of his children based on an expert report by Dr. Sol Goldstein.

At trial, Dr. Goldstein failed to appear as a witness despite being served a summons and thus his evidence was given no weight. Dr. Goldstein's original opinion was that due to the mother's mental health, the children should immediately be removed from her based on parental alienation. However, six and a half years later, the trial judge found that there was "an abundance of evidence" that both children have been subjected to verbal, emotional and psychological abuse by the father. The trial judge finally awarded custody to the mother and the Court of Appeal affirmed that decision.

**What remedies can the court award?**

In the case of *W.C. v. C.E.* (2010 ONSC 3575 at para. 130), Dr. Barbara Jo Fidler provided evidence on four courses of action that can be taken when parental alienation is found:

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

Dr. Fidler indicated that there is no one-size-fits-all remedy to parental alienation matters. Each option must be assessed in terms of the risk and benefits with the ultimate goal being that the child has a relationship with both parents.

Justice Sherr, in *F.S. v. M.B.T.* (2023 ONCJ 102), emphasized that the court has the authority to order reunification counseling pursuant to subsections 28 (1) (b) and (c) (vii) of the *Children's Law Reform Act* and such orders are often made in cases of parental alienation.

Notably, in the case of *Testani v. Haughton* (2016 ONSC 5827 at para. 18), Justice Jarvis held that reunification therapy orders should be made sparingly and that, "[t]he request must be adequately supported by a detailed proposal identifying the proposed counselor and what is expected."

Justice Noble, in the case of *L.M. v. J.B.* (2016 NBQB 93 at paras. 135 - 137), also discussed the importance of keeping siblings together when tailoring a remedy:

> N.B. is **so closely bound to his siblings he could not and should not be separated from them** …
>
> …
>
> An order requiring N.B. to live with his father while his siblings continue to live with Ms. M., would be unfair and unreasonable for them all. **It would not take the existing ties between the children into consideration**. To do so **would not be in his or their best interests**. (emphasis added)

One of the most intensive remedies for parental alienation cases is the program called Family Bridges. The genesis of the program was explained by Justice Loo in W. (J.C.) v. W. (J.K.R.) (2014 BCSC 488 at para. 39).

> The Family Bridges Program is based on scientific principles from cognitive psychology, social psychology, developmental psychology, sociology, social neuroscience, and multimedia learning. The Family Bridge Program has been peer reviewed by psychologists and other such professionals, and is recognized as a highly successful reunification program.

In *M.S.R. v. D.M.R.* (2022 BCSC at para. 330), Thomas J. reaffirmed the benefits of using the Family Bridges program and described it as an intensive counselling period at a third-party location followed by a period of no contact of at least 90 days from the favoured parent.

Another similar program that currently exists is offered by Dr. Barbara Fidler, called "Families Moving Forward". It is a multi-day family intervention and is composed of two phases. The phases and costs were outlined in *Barrett v. Huver* (2018 ONSC 2322 at para. 44):

> The materials from Families Moving Forward include the estimated costs of a multi-day family intervention. The estimated costs for "Phase I: Referral, Clinical Intake Consultations and Pre-Intervention" range from $2,700.00 to $6,800.00. The estimated costs for "Phase II: FMF Multi-Day Intervention (3 days at vacation location in Ontario)" range from $17,050.00 to $28,050.00. The estimated costs for "Hotel Accommodations" for two parents, two children and three therapists, inclusive of clinician meals, is $4,725. The total estimated costs for Phase I, Phase II and Hotel Accommodations range between $24,475 and $39,575.

In *T. (C.) v. M. (M.M.)* (2023 ONSC 7247), the father brought a motion to involve the Families Moving Forward program. Justice Mitrow noted that the father's proposal was an extreme solution and should not be ordered on a motion as it would remove the children from their mother and maternal family and be significantly destabilizing for both of them. Instead, the court held that the children should continue with their existing counselling. The court's reasoning included the finding that it was unable to conclude that the children were alienated and that it was still a triable issue.

## Conclusion

Parental alienation is a complex phenomenon in family law litigation proceedings, generally found in cases of high-conflict divorce. The jurisprudence canvassed above gives lawyers, judges and child psychologists alike a good framework within which to approach cases of parental alienation.

The guiding principles provided by the current jurisprudence on parental alienation shine light on the somewhat murky waters judges have to navigate when examining conflicting testimony provided by parents. We see how essential it is to look at a child's particular personality, age and unique experience and family situation when tailoring an appropriate remedy. We see the importance of carefully distinguishing circumstances which give rise to a finding of estrangement as opposed to parental alienation.

It is clear that there is no one-size-fits-all remedy for findings of parental alienation. The key consideration in all parental alienation cases is the best interests of the child, both in the short and long term.

We see a divergence in judicial opinion on whether expert evidence is required for judges to make a finding of parental alienation. Some judges favour expert evidence to support a finding of parental alienation, given the seriousness of such an allegation. Other judges are inclined to make a finding of parental alienation based upon factual analysis alone. All this being said, bald accusations of parental alienation will not be looked upon favourably by the courts. Moreover, expert evidence will be assessed carefully to ensure that there are no concerns regarding a lack of objectivity in methodology.

We also see the vehicle of an interim motion being used as a way to speedily resolve cases of parental alienation. That being said, it appears that in order to be successful on an interim motion, the evidence needs to overwhelmingly indicate parental alienation is present. In clear cases of parental alienation, an interim motion is indeed the most appropriate route to seek resolution, as waiting until trial would likely not be in the best interests of the child.

The jurisprudence has outlined a number of avenues which a court may take when granting a remedy in cases where there is a finding of parental alienation. There is no one-size-fits all solution. A court may simply do nothing; order a custody reversal by placing the child with the rejected parent; leave the child with the favoured parent

while the child undergoes therapy; or a transitional placement may be ordered along with therapy with the goal that the child eventually be placed with the rejected parent. The jurisprudence affirms the importance of keeping siblings together where possible.

In cases of parental alienation, judges certainly have their work cut out for them. Parental alienation is a complex and emotionally charged phenomenon, and courts have to delicately assess family situations and tailor remedies that are child-centered and child-focused. The best interests of the child are the ultimate deciding factor when tailoring a remedy.

The jurisprudence has indicated that judges are to avoid assigning blame in cases of parental alienation. The assignment of blame will only damage the family dynamic further and would certainly not be in the best interests of the child.

The ultimate goal is for a child to have a healthy relationship with both of their parents, wherever possible.