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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.

Legal Notice

The writers of the Ontario Family Law Monthly have contributed to this publication in lieu of spending more time with their family and friends. Depending on the family member or friend, the choice sometimes was purposeful. The writers have tried to provide the reader with enough legal information to help them understand the subject matter, but hopefully not too much as to put them to sleep. Regardless of the reader's conscious state during or after reading the article(s), **the OFLM is not a substitute in any way for legal or other professional advice, and no action should be taken by the reader without the advice of a lawyer** (and sometimes even if the reader is a lawyer themselves). Therefore, **if the reader requires legal or other expert advice, they should seek the services of a competent lawyer or other professional** (keyword is "competent").

How do we define time in the *Divorce Act*? "Substantially equal" and "vast majority", do they have any meaning?

David Tobin

Overview

There are three scenarios in which three different onuses apply when determining relocation applications.

> 1) The child spends substantially equal time with both parents = the relocating parent has the burden of proof to show that the relocation would be in the best interests of the child
>
> 2) The child spends the vast majority of time with the relocating parent = the left behind parent has the burden of proof to show that the relocation would **not** be in the best interests of the child;
>
> 3) In all other cases, both parents have the burden of proof.

The case law shows that courts do not take a bright-lined approach in determining whether a child spends the vast majority of time or substantially equal time with the parents. This means it is not merely a calculation of the percentage of time spent with a parent. Judges across the provinces have found that there is a qualitative and quantitative element to these terms. Courts have also determined that cases in the 'vast majority' scenario, usually involve a disinterested or uninvolved parent rather than an active non-primary parent.

Notwithstanding the onus provisions, the sole consideration on relocation applications is the best interest of the child. As such, both parents should prepare and present their case as though they have the burden of proof: they must demonstrate why their plan is best for the child.

The Legislation and Case Law

When the *Divorce Act* was amended in 2021 it codified many common law principles with respect to relocation and it also clarified which parent, the 'relocator' or the 'left behind parent', has the burden of proof in relocation cases. Section 16.93 of the *Act* sets out three scenarios where different onuses/burdens apply. The text of section 16.93 is set out below.

> **16.93** (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend **substantially equal time** in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.
>
> (2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the **vast majority of their time** in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.
>
> (3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

Immediately after 16.93, section 16.94 allows a judge not to apply the burdens in 16.93(1) or 16.93(2) if at the time of the hearing the child's time was determined by an interim order. This is an important section to keep in mind if there has not been a determination of parenting time on a final basis, as many courts have not applied the onuses where the only orders made were temporary.

Both "vast majority" and "substantially equal" are vague terms which elude numeric definitions. This appears to be by design, but unfortunately the discretionary ways in which courts can interpret these definitions makes predicting outcomes difficult.

Courts have generally determined that 80% of time with a parent crosses over into 'vast majority'. A few cases on this section have referred to Professor Rollie Thompson's

paper, *Legislating About Relocating, Bill C-78, NS and BC* (2019) where he states that he would set a threshold for 'vast majority' at 80 percent of the time. However, many courts have been reluctant to set a bright line for 'vast majority', wanting rather to consider the nature of the time in addition to the amount of time.

The policy for avoiding a bright-line approach is so that parents negotiate their children's schedule considering only their children's needs and interests. Courts do not want parents negotiating time with one eye on who will have the burden of proof at trial. This policy is recognized in *Droit de la famille – 211795* (2021 QCCS 3938) where Justice Narang wrote:

> If I were to find that parental time of 37.5%, as opposed to 40%, has a significant impact on deciding whether relocation should be authorised – and that section 16.93(2) instead of section 16.93(1) of the *Divorce Act* applies because of this 2.5% difference – this could have an impact on the ways in which parents agree and negotiate the division of parental time. Instead of being guided by their children's best interests, the impact of the time share on relocation decisions would become a consideration in some cases.

In a subsequent case from Justice Narang, Her Honour notes that only situations where the left behind parent is practically absent will the other have the 'vast majority of time'. In *Droit de la famille – 231099* (2023 QCCS 2687 at para. 27), Her Honour writes:

> "Vast majority" implies that the other parent is almost completely absent from their child's life: "*Ce ne sera que dans les cas où le parent qui conteste le déménagement n'a que des rapports sporadiques ou peu importants avec l'enfant qu'il assumera alors le fardeau de démontrer que le déménagement n'est pas dans l'intérêt de l'enfant*."

So when determining the term 'vast majority', percentages will likely not rule the day. Instead, a fact specific approach, guided by the amount of time will be considered in determining which parent bares the onus.

In *Rygiel v. Mathes* (2024 ONSC 33, at para. 21), Justice Brownstone found that a mother did not benefit from the onus provisions even though on the mother's calculation the child spent 74% of the time with her. Justice Brownstone notes that the father had "a close, active, and regular relationship with his son." Justice Brownstone determined that given the amount and nature of the time, this was a case of an "active non-primary parent", therefore, s. 16.93(3) applies, and each party had the burden of proving whether the relocation is or is not in the best interests of the child.

In *Shipton v. Shipton* (a case in which our firm was involved and the appeal of which, partially on this issue, was recently heard) squarely addressed the term 'vast majority' and how it fits into the legislative scheme setting out the various scenarios giving rise to different onuses.

In *Shipton,* the left behind parent had the child in his case 22.6% of the time at the time of trial. However, the arrangement which lead to this increase in time occurred right before trial.

Justice Akazaki determined that "the "vast majority" rule in subsection (2) reverses the onus stated in subsection (1). "This amounted **to a very limited legislative reversal** of the Supreme Court's ruling that there was no presumption in favour of the custodial parent's decision to relocate … Indeed, it is the *exceptionality* of the objector's parenting time displaced by the parenting time of the majority parent that governs the meaning of s. 16.93(2) by giving legal force to the circumstances of the parenting." (emphasis added).

At paragraph 102, Justice Akazaki, gleaned from the wording of the section and the legislative background and note that:

> The effect of subsection (2) is essentially to protect a custodial parent from being controlled by a relatively uninvolved ex-spouse by discouraging objections made in bad faith. … Parliament has essentially stated that, in certain cases, objectors must think twice before standing in the way. When read together with s. 16.91, the intent of Parliament is clear that subsection 16.93(2) was intended

> to discourage objections from those who were not expected to file objections under s. 16.91.

The term 'substantially equal' is also the subject of judicial interpretation. Similar to 'vast majority' a flexible approach is the preferred approach, but it cannot be untethered from the actual amount of time spent. In interpreting 'substantially equal', Justice Marion of the Court of Kings Bench of Alberta (*Lemay v. Lemay*, 2023 ABKB 303, at para. 73) determined that "While precise formulas or specific percentages are not the overriding factor in determining "substantially equal" parenting time, they do provide some guidance on thresholds." Noting that many cases involving 50/50 parenting will obviously be substantially equal and that although not a hard cut-off, the 40/60 split is a rough indicator of the lower end of the threshold.

Justice Marion goes on to state that when cases are close to the 40% time "the specific factual context becomes critical, viewed in light of the underlying policy behind the burden of proof in section 16.93(1), namely that in cases of substantially equal parenting, all else being equal, the starting point is that the stability of the *status quo* is in the best interests of the children" *(Lemay v. Lemay*, 2023 ABKB 303, at para 76).

The strict reading of the sections also makes it clear that whether the child spends the 'vast majority' of the time with a parent or 'substantially equal' time with the parents, it must be pursuant to an order, arbitral award, or agreement (agreements need not be formalized in writing) for this to impact the onus/burden. It follows that a parent cannot disturb a status quo by reducing the amount of time the child spends with the left behind parent to benefit from an onus (*S.T. v A.T*, 2023 BCSC 875, at para. 54; *JRD v. AKMD*, 2023 ABKB 685, at para. 12).

That is not to say that compliance with any oral orders is necessary to benefit from the onus provision. In *Tass v. Jackson* (2023 ONSC 6564, at para. 29), a father argued that a relocating mother should not benefit from the burden in light of her breaches of

orders. Justice Chang determined that that argument could not succeed. At paragraph 29, Justice Change wrote:

> [29] In my view, read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme of the *Divorce Act*, s. 16.93 does not, as the respondent suggests, provide for an "if you comply, then you can rely" regime for the applicable burdens of proof. **Rather, it provides for differing burdens of proof based on the amount of time that a child should (pursuant to court order, arbitral award or agreement) and actually does spend in the care of each parent.** The requirement of substantial compliance in s. 16.93 is expressly and, in my view, intentionally directed at both parents in a relocation application. (emphasis added)

Conclusion

Section 16.93 sets out three difference scenarios where three different burdens/onuses will apply in relocation cases. The terms "substantially equal" and "vast majority", which determine which parent has the burden of proof in relocation cases are intentionally vague, to allow for many different arrangements which could fit within either term.

Lawyers and parents must keep in mind that it is not just the amount of time, but also the nature and quality of the time that is important when determining which parent has the onus. Given the uncertainty built into these terms, both parents, whether relocating or staying behind should prepare their cases as though they have the onus. **Why?** Because notwithstanding the onuses, the court will determine all relocation applications based solely on the best interest of the child. Both parents, ought to provide comprehensive and cogent evidence about why their parenting plan best meets the needs of the child. A parent that focuses too heavily on which parent has the burden of proof may risk winning the battle at the expense of the war.

What's mine is…. mine: Surreptitiously obtained documents in family law proceedings

Christina Hinds

Overview

In *Moran v. Moran* (2023 ONSC 6832) Justice Kraft heard a motion brought by the husband after the wife accessed private documents on his computer. Those documents included privileged documents which the wife downloaded onto her computer. She then tried to rely on those documents in the family court proceeding. Justice Kraft reviewed the case law relevant to the unauthorized accessing of privileged documents and the three-part test to determine the appropriate remedy.

As a record of extent and nature of the surreptitiously obtained evidence is required before the three-part test can be used to determine the admissibility of the evidence, Justice Kraft considered what orders were necessary to determine the extent and nature of the documents downloaded by the wife.

Justice Kraft ultimately ordered that: (a) there be a forensic investigation of the wife's laptop and costs of the investigation to be paid by the wife (subject to reapportionment at trial); (b) the wife be restrained from sharing any of the husband's documents with third parties; and (c) the wife be compelled to provide the names and contact details of any person that she had already provided the documents to.

Facts

The wife admitted that she accessed the husband's personal computer and downloaded documents from his computer to her laptop without his knowledge or consent. The husband discovered this when the wife attached his private documents, such as emails and text messages, as exhibits to her affidavit in support of an unrelated

motion. The wife admitted that she entered the matrimonial home occupied by the husband and made a copy of his computer, including copies of private and confidential emails, documents, and text messages. She did not tell the husband that she was coming to the home and did so while he was not home. The full extent of the documents copied was unknown and the husband sought to compel the wife to deliver her laptop for forensic investigation.

The wife tried to justify her actions by explaining that she accessed his computer through the home "network" and that this was normal for her to do during the marriage. She reasoned that the husband had been evasive with respect to financial disclosure and without accessing his computer herself, she would have not been able to prove it.

The wife denied looking at any solicitor-client privileged documents, but also stated that she deleted any privileged documents "because she knew" that they were privileged.

Analysis

Justice Kraft did not accept the wife's explanations. Citing *Celanese Canada Inc. v Murray Demolition Corp*. (2006 SCC 36). Justice Kraft cautioned that: "A violation of privilege poses a significant threat to the administration of justice. To avert this risk, the courts must act 'swiftly and decisively.'" (at para. 13)

At paragraph 15, Justice Kraft considered the three-part test for resolving issues of unauthorized access to privileged documents (as set out in *Celanese* and more recently, in *Continental Currency Exchange Canada Inc. v. Sprott* (2023 ONCA 61)):

1. At the first stage, the moving party must establish that the opposing party obtained access to relevant privileged material.

2. At the second stage, the onus switches to the opposing party. Once the first stage of the test is met, the risk of significant prejudice is presumed, and the opposing party has the onus to rebut the presumed prejudice.

   Her Honour explained that the wife can successfully rebut the presumption by identifying "with some precision" that: (i) she did not review any of the privileged documents in her possession; (ii) she reviewed some documents, but they were not privileged; or (iii) the privileged documents reviewed were nevertheless "not likely [to] be capable of creating prejudice". The evidence must be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur".

   Where the precise extent of privileged information is unknown and possibly unknowable, the court should infer that confidential information was imparted unless the wife satisfies the court that no information was imparted which could be relevant.

3. The third stage is to determine an appropriate remedy.

With respect to the first stage, the wife admitted under oath to accessing documents on the husband's computer. While she stated that she "deleted" privileged documents, she explained that she deleted such documents because she knew they were privileged. Justice Kraft noted that "Without the forensic review of what was taken by the wife surreptitiously, it is impossible for the husband to know the extent of privileged materials that she [has] obtained." (at para. 15)

With respect to the second stage, Justice Kraft considered the reasons for the reverse onus and presumed prejudice to the husband:

> As summarized in *Celanese*, at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the appellants in receipt of privileged information including:

a. Requiring the husband whose privileged information has been disclosed or accessed to prove actual prejudice would require them to disclose further confidential or privileged materials;

b. Placing the burden on the wife who has access to the privileged information is consonant with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and

c. The husband does not have to bear "the onus of clearing up the problem created by" the wife's actions.

While it was established that the wife had accessed the husband's confidential and privileged information, the scope of what had been downloaded by the wife could not be determined without a forensic investigation. Justice Kraft noted that after a review of the wife's computer and depending on the outcome, the husband may be entitled to seek a stay of proceedings or seek to remove the wife's legal team. (at para. 15)

Once a complete record of the extent and nature of the surreptitiously obtained evidence is available through the forensic audit, the admissibility of that evidence can thereafter be determined. (at para. 16)

Decision

Her Honour made an order for a forensic investigation of the wife's computer and costs of the investigation to be paid by the wife (subject to reapportionment at trial); an order restraining the wife from distributing the documents to third parties; and an order that the wife provide a list of the names and contact details of the individuals that she already sent the husband's documents to.

With respect to the forensic investigation, both parties proposed different investigators. The forensic investigator proposed by the wife provided a detailed scope of review which Justice Kraft determined to be appropriate, varied slightly to include specific relief sought by the husband in his Notice of Motion, including: (a) a full

inventory of all records on the computer, when each record was created, when it was reviewed, and for how long; (b) examining and identifying what records were deleted and when those documents were reviewed; and (c) identifying and extracting all of the husband's documents from the wife's computer. (at para. 23 and 26)

Justice Kraft also granted the restraining order as sought by the husband pursuant to section 46(1) of the *Family Law Act,* R.S.O. 1990, c.F.3. Her Honour noted that while restraining orders in family law matters are generally made to restrain direct or indirect contact, section 46(3) "permits the court to make a restraining order that contacts any other provisions that it considers appropriate." (at para. 30)

Takeaways:

1. If a client provides you with obviously private documents that belong to the other party, inquire as to how your client obtained those documents.

2. Make sure your client understands boundaries following separation. In *Moran*, the wife tried to explain that she previously accessed the husband's computer during the marriage. While not the case in *Moran*, this conversation may be especially important when parties continue to live together after separating, as such boundaries may not be as clear.

The costs of withdrawing a case

Amruta Ponkshe

Overview

Rule 24 of the *Family Law Rules* specifically deals with costs and establishes a presumption that the successful party is entitled to costs of a motion, enforcement, case or appeal.

But what happens when a proceeding is withdrawn before its conclusion? In such situations, subrule 12(3) comes into play in supplement to the broader Rule 24.

Subrule 12(3) establishes that a party who withdraws all or part of an application, answer or reply *shall* pay the costs of every other party in relation to the withdrawn application, answer, reply or part, up to the date of the withdrawal, unless the court orders or the parties agree otherwise.

In this article, we look at two recent cases discussing the application of rule 12(3), as well as factors judges consider in determining whether costs should be awarded or not, as well as the quantum of costs.

Gorman v. Gorman (2023 ONSC)

The recent decision of Justice McGee in *Gorman v. Gorman* (2023 ONSC 6837) provides a thorough refresher on costs payable on withdrawal of a claim.

Facts

The parties in this case separated in 2012 after their eight-year marriage. In a final consent Order dated February 3, 2014, the parties resolved the legal issues arising from their separation.

At some point after the final Order, the husband sued the operator of a company, Low-Risk Logistics, in which he had prior involvement. The litigation formally ended September 2020, with no recovery to the husband and a costs award against him of over $200,000.

In 2016, the wife brought a motion to set aside terms within the final Order, claiming that the husband has held an undisclosed interest in the company on the date of separation and therefore owed her an equalization payment.

The husband's failure of the litigation against the company eliminated any basis for the wife's potential equalization claim, or a material change respecting support. Moreover, the limitation period for a claim for an equalization payment had expired in August of 2018 pursuant to section 7(3) of the *Family Law Act*.

To this end, the husband made two formal, Rule 18 Offers to Settle. The Offers were identical, but for the dates on which the term for a withdrawal without costs was available. The wife did not accept either offer. Neither did she make a reasonable offer.

Ultimately, in October 2023, the matter came before Justice McGee as an Exit Pre-Trial. The wife did not attend. She did not file any materials for the conference either. The Court Registrar was able to reach the wife on the phone at which point the wife indicated she was no longer interested in participating in the proceeding.

The trial date was vacated, and the motion dismissed. It was left to Justice McGee to decide the costs to be paid to the husband.

The wife did not attend the cost hearings. The husband asked for costs of the proceeding in the range of $100,000.

Decision and *Orbiter Dicta*

Justice McGee held that the cost consequences of a withdrawal, as set out in Rule 12(3), ought to be extended to a moving party who has effectively abandoned a proceeding by failing to further participate.

The wife had not served a formal Notice of Withdrawal. Instead, she simply stopped participating. She also failed to comply with the terms of the Trial Scheduling Order and to advise the husband's counsel and the trial coordinator that she was not attending the trial. However, her Honour explained that the harm caused to the participating party was the same.

After reviewing the costs principles under Rule 24, establishing that a successful party is presumptively entitled to an award of costs per Rule 24(1), her Honour discussed that:

> (A)n award is neither a recovery of every dollar spent, nor a line-by-line analysis of what was, or ought to have been incurred in legal fees. Instead, the analysis is founded on what an unsuccessful party could have reasonably expected to pay in costs. Parties are responsible for the positions that they take in litigation, and for the costs incurred by the opposing party, if those costs were incurred as a result of a party's unreasonable litigation conduct. (at para. 29)

In reaching her decision, Justice McGee considered the purposes of a costs award as discussed in *Mattina v. Mattina* (2018 ONCA 867).

In *Mattina*, at paragraph 10, the Ontario Court of Appeal reiterated that the modern family cost rules are designed to foster three fundamental purposes:

(a) to partially indemnify successful litigants;

(b) to encourage settlement; and,

(c) to discourage and sanction inappropriate behaviour by litigants.

The Appellate Court also recognised that rule 2(2) adds a fourth fundamental purpose: to ensure that cases are dealt with justly. This was previously established in

E.H. v. O.K. (2018 ONCJ 578), at paragraph 8 and in *Sambasivam v. Pulendrarajah* (2012 ONCJ 711), at paragraph 37.

In setting the amount of costs payable by the wife, Justice McGee reviewed the factors set out in Rule 24(12) and the cost consequences of failure to accept an offer. Her Honour noted that the wife "was a litigant of some sophistication" and that she had "started her litigation in good faith" (at para. 31).

However, Justice McGee discussed that the wife should have reassessed her family law claim after the husband's civil litigation had failed. But she did not do so. Most of the litigation costs were incurred after the civil litigation failed and the husband incurred significant legal costs in defending a proceeding that became increasingly disproportionate. Her Honour discussed that when the wife found nothing upon which to improve her litigation position, she abandoned the proceeding, leaving the husband with significant legal fees.

Her Honour reiterated that the wife's actions amounted to unreasonable litigation conduct that must be discouraged. At paragraph 38, Justice McGee stated:

> I see no basis upon which (the wife) ought not be required to pay (the husband's) costs of the proceeding.

Her Honour discussed *Beaver v. Hill* (2018 ONCA 840) and held that:

> Rule 12(3) does not set out the scale of costs to be paid by a withdrawing party. Costs are discretionary and there is no provision for a general approach of "close to full recovery" costs. Instead, courts may increase or decrease what would ordinarily be an appropriate amount of costs based on the behaviour of the parties and the presence of absence of Offers to Settle.

The husband asked that he receive a partial recovery of his fees up to the date of his second Offer and a full recovery thereafter because the wife could have withdrawn her claims without costs.

Rule 18(14) provides that a party who makes an Offer with more favourable terms than the result is entitled to a full recovery of costs to the date the Offer was served unless the court orders otherwise. However, Justice McGee declined to award a full recovery of the husband's fees for the period between the date of his second order and the start of the hearing because subrule 18(14)(3) also requires that the Offer not expire and not be withdrawn before the hearing starts.

Justice McGee noted that the term that the wife pay no costs upon withdrawal was only open for acceptance for nine business days, not until the start of the hearing.

The wife was ordered to pay the husband costs of $51,076 with $44,000 towards legal fees, $1,200 in disbursements and HST of $5,876.

Walia v. Walia **(2022 ONSC)**

In *Walia v. Walia* (2022 ONSC 6704), the applicant husband added the respondent wife's parents and brother as parties to the family law proceeding. He then withdrew all of the application as against the wife's parents and brother. The added parties then sought approximately $37,000 in costs on a full recovery basis. The applicant argued that rule 12(3) does not include circumstances where the case against only a co-party was withdrawn. He contended that the rule only applies in limited circumstances where a case is ended by withdrawal before trial.

Justice Agarwal disagreed and at paragraph 20, discussing that:

> Rule 12(3) states that a "party who withdraws all or part of an application…." [emphasis added]. The legislature expressly contemplated circumstances where, as here, the case continues after withdrawal. There is nothing in the "grammatical and ordinary sense" of the words in the rule that would limit the entitlement to costs under rule 12(3) to withdrawals against the main party.

As discussed in *Walia*, while there is no binding legal test for the exercise of the court's discretion to deny costs under rule 12(3), the caselaw identifies some factors:

- whether the claim was frivolous or vexatious: *Sgrignuoli v Sgrignuoli* (2015 ONSC 5537);
- whether the claim had merit: *B.L. v. M.L.* (2003 ONSC 1948);
- whether the costs were "thrown away": *Benson v. Crawford* (2012 ONSC 5932);
- the withdrawing party's financial means: *Dixon v McGhann* (2021 ONCJ 72).

Justice Agarwal then considered factors in rule 24(12), including with each party's behaviour. His Honour noted that both parties litigated in the most aggressive and high-conflict manner possible, and that the parties repeatedly used the court's limited resources and time for their personal ends, taking away court time from other parties in the system who have equally important matters that need resolution. His Honour also examined the time spent by each party, whether there were any written offers to settle, and the legal fees incurred by each party.

Justice Agarwal concluded that the case did not justify full indemnity costs, considering that all parties conducted themselves poorly and that full recovery of costs is available where a changed order is set aside [Rule 15(13)], failing to accept an offer [Rule 18(14)], and for bad faith [Rule 24(8)].

Test under Rule 23.05(1) of the *Rules of Civil Procedure*

As discussed above, in a family law case, if a party withdraws a case, or an answer to a case, they *shall* pay the costs of the other party, unless the Court orders or the other party agrees otherwise.

Notice that this is not the same as the rule governing civil cases where a party *may* ask the Court to order costs. Under the civil law regime, as per Rule 23.05 (1) of the *Rules of Civil Procedure*, if all or part of an action is discontinued, any party to the action may, within thirty days after the action is discontinued, make a motion respecting the costs of the action.

Rule 23.05(1) was amended in 2009 to remove the plaintiff's prima facie entitlement to costs. In contrast, rule 12(3) of the *Family Law Rules* maintains "every other party's" prima facie right to costs.

In *Digiuseppe v. Todd* (2012 ONSC 1028) at paragraphs 22-24, Justice McCarthy discussed that when a plaintiff discontinues an action against a defendant, "the plaintiff must satisfy the court that the material filed discloses a bona fide cause of action, that is not frivolous or vexatious and which the plaintiff had some justification to commence, having regard to the conduct of the defendant".

In *Bank of Nova Scotia v. Pappas* (2019 ONSC 840), at paragraph 15, the court explained how to assess the merits or good faith of a withdrawn case as follows:

> A consideration of what constitutes a bona fide claim should not involve speculation on the ultimate merits of the claim nor on what might have been the result had the claim been adjudicated. Similarly, it should not be part of the court's analysis to weigh the merits of potential defences available to the defendant.

Test for determining costs under Rule 12(3)

In *Walia*, Justice Agarwal discussed that the factors considered under rules 24 and 12(3) mirror this test used under rule 23.05(1) of the *Rules of Civil Procedure*. Based on the analysis of the test under the civil law regime, his Honour proposed that the correct approach for deciding costs under rule 12(3) is as follows:

1. First, the preliminary question is whether the applicant satisfied the court that the material filed discloses a bona fide cause of action (i.e., that is not frivolous or vexatious and that the applicant had some justification to start the proceeding, having regard to the respondents' conduct).

2. If the proceeding is not bona fide then it is necessarily started in bad faith and, under rule 24(8), the court shall decide costs on a full recovery basis and shall order the applicant to pay them immediately.

3. If the proceeding is bona fide, the court's discretion should be exercised by reference to the considerations in rule 24(12) of the *Family Law Rules*.

In *Dixon v. McGhann* (2021 ONCJ 72), at paragraph 28, Justice Spence discussed that on the wording of subrule 12(3), the court must decide two things – first, does the presumption of an entitlement to costs apply; and second, if it does, what is the amount of costs that the court ought to order.

The test proposed by Justice Agarwal, as discussed above, aligns with Justice Spence's decision in *Dixon*.

Jurisprudence

In *Serra v. Serra* (2009 ONCA 105), at paragraph 103, the Ontario Court of Appeal held that the withdrawal of a case can be done unilaterally at any stage of the proceedings as per rule 12, unlike under the comparable provision in civil cases where leave of the court is necessary once the pleadings are closed. But there are cost consequences. Thus, if the withdrawing party seeks to avoid the cost consequences flowing from the withdrawal, that party must persuade the court to make an order avoiding or minimizing the costs.

As seen in *B.L. v. M.L.* (2003 ONSC 1948) and *Davidson v. Ferrill* (2006 ONCJ 472), the judge hearing the claim for costs can decline to make an award of costs when the application was commenced in good faith.

In *Welch v. Welch* (2023 ONSC 6550), at paragraphs 42 and 43, Justice Pazaratz noted that Rule 12(3) creates a rebuttable presumption that a party withdrawing a claim must pay costs of the other party. His Honour further discussed that failing to show up for your court case is even worse than formally withdrawing your claim, because it leaves the other side having to prepare and attend for a needless court appearance.

Justice Pazaratz held that determining costs requires more than a simple mathematical totalling of how much the successful party paid their lawyer.

- The amounts actually incurred by the successful litigant are not determinative. The Court's role in assessing costs is not necessarily to reimburse a litigant for every dollar spent on legal fees: *Aprile v. Aprile* (2016 ONCJ 678) and *Kommineni v. Guggilam* (2022 ONCJ 191).
- The overall objective is to fix an amount that is fair and reasonable from the unsuccessful party's perspective. This includes considering the amount the unsuccessful party could reasonably have expected to pay if they were unsuccessful in the litigation: *Arthur v. Arthur* (2019 ONSC 938); *Mussa v. Imam* (2021 ONCJ 92) and *Kerr v. Moussa* (2023 ONCJ 82).

Finally, as held by Justice Chown at paragraph 13 in *Tintinalli v. Tutolo* (2022 ONSC 6276), the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant.

Conclusion

The possibility of severe cost consequences is one of the many significant factors that family lawyers should discuss with clients in determining the course of action for their family law issues. It is very important that as family lawyers, we advise clients that there has to be a good reason to commence a case in the family court, and at times there needs to be an even better reason to withdraw it.

To move or not to move to Alberta – a summary judgment

Samantha Rich

Overview

In the case of *Tremblay v. Shadwell* (2023 ONSC 6689), the mother brought a summary judgment motion under Rule *16* of the *Family Law Rules*. In particular, the mother requested the permission of the court to move back to her home province, Alberta, with her children along with the parties' three-year-old son. The father objected to the relocation.

The court carefully reviewed the mother's reasons for moving, which included a better support system as well as her psychological wellbeing. The court also reiterated that these and other important factors are weighed against a non-moving claim to spend as much time with their child as possible. This was especially true in this case where the father's parenting plan was lacking.

The court found that the mother was permitted to move to Alberta with the child and also granted the mother primary care and decision-making. The father was granted parenting time and a dollar-for-dollar credit against his support for his parenting time costs.

Background

The parties had a brief relationship that resulted in the birth of a child that lived with the mother since birth. The father moved out of the parties' home a month after discovering that the mother was pregnant. Initially, the father had little to do with the child and only became involved after a DNA test proved his parentage.

The father had parenting time with the child every second weekend pursuant to an agreement made between the parties which was made more than a year after the

child's birth. The father exercised his parenting time consistently pursuant to the agreement.

The mother subsequently decided to move back to Alberta to be closer to family. The mother brought the mobility motion on an urgent basis as the closing of the sale of her home was imminent.

Best Interests of the Child

The court determined that this matter was essentially a relocation motion (at para. 9).

As the parties were not married, the best interests of the child were determined under the *Children's Law Reform Act* (the "*CLRA*").

Section 39.4(3) of the *CLRA* requires the court to take into account the best interests of the child in accordance with *section 24* as well as the following factors:

> (a) the reasons for the relocation;
>
> (b) the impact of the relocation on the child;
>
> (c) the amount of time spent with the child by each person who has parenting time or is an applicant for a parenting order with respect to the child, and the level of involvement in the child's life of each of those persons;
>
> (d) whether the person who intends to relocate the child has complied with any applicable notice requirement under section 39.3 and any applicable Act, regulation, order, family arbitration award and agreement;
>
> (e) the existence of an order, family arbitration award or agreement that specifies the geographic area in which the child is to reside;
>
> (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of decision-making responsibility, parenting time or contact, taking into consideration, among other things, the location of the new residence and the travel expenses; and
>
> (g) whether each person who has decision-making responsibility or parenting time or is an applicant for a parenting order with respect to the child has complied with their obligations under any applicable Act, regulation, order,

> family arbitration award or agreement, and the likelihood of future compliance (at para. 10).

Justice McDermot determined that as there was no family violence or outstanding orders concerning the child, *sections 39(3)(e)* and *24(j)* and *(k)* were irrelevant in the matter. *Section 24(3)(e)* also was not relevant as the child was too young to express his views and preferences (at para. 12).

Onus of Proof

Justice McDermot succinctly set out the onus of proof required. Under *section 39.4(4)* of the *CLRA*, if care of the child is shared equally, the onus is on the party seeking to move to prove that the move is in the child's best interests.

However, under *section 39.4(6)*, if the parties are complying with an agreement that provides that the child spends the "vast majority of time in the care of the party who intends to relocate the child", the onus shifts to the party objecting to the move to demonstrate why it is in the child's best interests not to move.

If the time sharing is unclear or somewhere between these extremes, both parties bear an onus to address whether the relocation is in the best interests of the child (at para. 13).

It is noteworthy that the provision in the *CLRA* with respect to the burden of proof at section 39.4 are identical to the *Divorce Act* provisions at section 16.93. (For more on the *Divorce A*ct provisions, please see David Tobin's article, "How do we define time in the *Divorce Act"* found above (OFLM 2024-1).

Summary Judgment Motion

Justice McDermot affirmed that although the mother sought a final order, the criteria to be addressed by the court would largely be the same whether the order was final or not (at para. 14). Furthermore, the Supreme Court of Canada in *Berendregt v. Grebliunas* (2022 SCC 22) stated at paragraph 112 that, "Without a pre-existing judicial determination, a parent's desire to relocate is simply part of the factual matrix in the assessment of what parenting arrangement is in the best interests of the child."

Justice McDermot summarized *Family Law Rule 16* stating that the moving party is required to:

> … provide evidence, by way of affidavit or otherwise, containing "specific facts showing there is no genuine issue requiring a trial." That evidence must be met by the responding party not relying on "mere allegations or denials" but evidence of "specific facts showing that there is a genuine issue for trial". … Hearsay evidence is discouraged … and the court now has powers to weigh the evidence, evaluate credibility and drawing inferences from the evidence … (at para. 17)

Justice McDermot cited the seminal case of *Hryniak v. Maudlin* (2014 SCC 7) addressing these powers in the context of *Rule 20* of the *Rules of Civil Procedure*, which are similar to *Rule 16* of the *Family Law Rules*:

> … the touchstone in a summary judgment motion is fairness: is the court able to make an accurate determination of fact on the basis of the written record? If so, then a decision on the motion is fair and proportionate considering the issues before the court. If not, then the court can have recourse to the powers under r. 16(6.1) in assessing the evidence of the parties prior to dismissing the motion or ordering a trial (at para. 18)

The court also cited Justice Spence's decision in *Yousuf v. Shoaib* (2007 ONCJ 80), noting that the test on an interim motion for mobility is the same as that for summary judgment (at para. 19).

Furthermore, Justice McDermot noted that "courts are reluctant to grant interim mobility motions, which often seriously disrupt the lives of children, where there is a genuine issue for trial, thereby creating the potential for disrupting the child's life once again, should the outcome at trial require the child to return to the city where he or she formerly lived." (at para. 19)

The court also reminded us that *Rule 16(4.1)* requires the party responding to a motion for summary judgment to put their "best foot forward" and provide the court with the evidence which they would have led at trial. It is also assumed that all of the evidence that a litigant would present at trial is contained in their affidavit (at para. 20).

Decision

Justice McDermot found the following:

- the mother had been the child's primary caregiver since birth and had exercised decision-making authority concerning him (at paras. 29 - 30). The parties did not communicate well and were unable to co-parent effectively.
- The mother did not have a support system or employment keeping her in Ontario (at paras. 32 - 33). The mother provided a plan for parenting time for the father including half of the summers as well as any time the father wishes to spend with the child in Alberta (at para. 34).

Ultimately, Justice McDermot decided that the mother made a prima facie case supporting the relocation to Alberta (at para. 36).

Furthermore, the court found that the father's negative view of the mother would eventually be reflected back to the child and that the father would potentially not encourage the relationship between the mother and the child if he were placed in his care. The father also did not have a thought-out parenting plan if the child were to remain with him in Ontario (at paras. 47- 49).

Justice McDermot determined the father to lack empathy regarding the mother's mental health issues. The father also did not present any of his own evidence regarding the mother's mental health and how that negatively impacts her parenting. The court found that despite the mother's mental health issues, she was still able to address her children's best interests (at para. 50).

Furthermore, Justice McDermot did not find the father's claim to be a genuine issue for trial. He cited Justice Laskin's decision in *Reeves v. Brand* (2018 ONCA 263) asserting that a mobility case involves balancing competing interests in the best interests of the child:

> Relocation or mobility cases, where one parent wants to take a child and move some distance away from the other parent, are among the most difficult cases in family law. If the custodial parent is permitted to move with the child, inevitably the relationship between the non-custodial parent and the child will be affected and may suffer. Typically the court must balance the custodial parent's legitimate interest in relocating with the non-custodial parent's legitimate interest in maintaining a relationship with the child. But in every case, the ultimate question is what is in the best interests of the child. (at para. 64)

Justice McDermot emphasized the father's lack of evidence for his claims. He found that the father did not satisfy his onus to prove that the move is not in the child's best interests. He determined that the father bears the responsibility of responding to the summary judgment motion and meeting his onus to prove on the balance of probabilities that the relocation is not in the child's best interests. He found that the father had not met his onus in this respect (at paras. 65 – 66).

Justice McDermot concluded that, "on balance, any disadvantage to the child resulting from reduction in parenting time with the father is made up by the obvious benefits to the child in relocating to Alberta with his mother" (at para. 68).

Discussion & Conclusion

In *Tremblay*, Justice McDermot placed a lot of weight on the fact that the mother as the primary caregiver of the child did not have a support system in Ontario. This is congruent with decisions in other relocation applications. For example, Justice Diamond in *Reeves v. Brand* (2017 ONSC 2306) granted a relocation where the court noted that, "Terri is returning home to where her support system is, and has always been" and "Terri wants to surround herself with the social (and possible financial) support of her family and friends with a view to regaining control and independence of her life" (at paras. 63 - 64). It is clear that Justice Diamond placed great weight on the applicant being close to her support system in making a decision.

However, it should be noted that the mere claim to want to relocate to be closer to one's support system will not always guarantee the court granting a relocation order in a moving parent's favour. Justice Chiappetta in *Knop v. Nezami* (2016 ONSC 3179), dismissed the mother's application to relocate with the child despite the mother citing one of the reasons of wanting to relocate with the child was to be closer to her family (at para. 144).

A lesson to take from Justice McDermot's decision in *Tremblay* is to ensure that sufficient evidence is presented to the court when applying for relocation as well as responding to a relocation application on your client's behalf. It will not be enough to simply object to a relocation application without sufficient evidence indicating why it would not be in the child's best interests.

The court has a careful balancing act to maintain when making determinations in relocation matters. The court needs to be cognizant of the moving parent's reasons for moving, such as better employment, being closer to a support system as well as a parent's psychological wellbeing. These important factors in favour of a moving parent need to be weighed against a non-moving parent's right to spend as much time with their child as possible. In this matter, we see that Justice McDermot placed value on the mother providing a parenting time plan recognizing the importance of

the father spending time with the child. Contrasted with this, we see the court's express displeasure with the father's lack of parenting plan when he put forward his claim for primary care of the child.

Yet again, *Tremblay* reminds us that when courts decide relocation cases, they will revolve around the best interests of the child principles and good old fashion evidence.

"Leveling the playing field" with interim disbursements

Ainsley Doell

Overview

When a litigant finds themselves in need of funds to advance their legal claims, they may bring a motion seeking interim disbursements. This article looks at the test that needs to be met by the moving party in such a case, and looks at leading and recent case law, starting with Justice Sharma's decision in *Hrvic v. Hrvic* (2023 ONSC 6429).

Introduction

The cost of advancing legal claims can be a significant barrier for many litigants, no matter how strong their claims may be. This access to justice concern is compounded where there is a large disparity between the financial means of the parties.

One way in which the court can help "level the playing field" between litigants is by awarding interim disbursements to ensure that parties have the cash on hand that is needed to advance their claims. Of course, this cannot be done in all instances and there is a test that must be met before the court will exercise its discretion to make such an order.

The rationale underlying an award for interim disbursements mirrors that which justifies costs awards, except that interim disbursements are awarded where the funds are needed right away, otherwise the case may not proceed for lack of funds.

This was an issue that was addressed by Justice Sharma in the recent case *Hrvic v. Hrvic* (2023 ONSC 6429), where the Respondent wife brought a motion seeking either an advance on her equalization payment or interim disbursements in order to ensure that she was able to continue pursuing her legal claims.

Justice Sharma declined to order an advance on the wife's equalization payment, as there was significant uncertainty as to the likely minimum amount that she would be entitled to. However, he did order that the husband to pay the wife $118,000 as an interim disbursement, which was not far from the $150,000 that she initially sought.

This article will look at *Hrvic v. Hrvic* as an entry point into a discussion of the leading case law on the issue of interim disbursements in family law cases, and then discuss other recent cases where similar orders have been made. In doing so, the article will highlight what appear to be relevant facts that tend to militate in favour of interim disbursements being awarded.

Hrvic v. Hrvic

a. Setting the scene

In *Hrvic*, the parties were married for around 10 years, during which time the wife stayed home and cared for the parties' child while the husband worked. The husband worked for a construction company, and the parties take different positions on whether he is self-employed or merely an employee of the company. The husband maintained that he did not have an interest in the company, and that the 50% interest that the wife sought to attribute to him was in fact his mother's.

As family law lawyers know, this is a common recipe for a headache when it comes to determining income for support purposes.

The wife's position on her motion was that she had exhausted all of her financial resources, and that the husband had substantially more than her and was causing delay by failing to comply with his disclosure obligations. The husband argued that he did not have the funds to pay the $150,000 disbursement sought and that he had provided all the disclosure in his possession, and that disclosure from the construction company was not something that he could comment on.

b. Interim disbursements

Justice Sharma began by pointing to Rule 24(18) of the *Family Law Rules* as the source of the court's authority to order interim disbursements "to cover part of all of the expenses of carrying on the case, including a lawyer's fees" (at para. 30). As we will go on to see, this goes beyond the payment of the lawyer's legal fees and often extends to fees required for the preparation of an income or business valuation by a Chartered Business Valuator.

Justice Sharma highlighted that this authority is discretionary and also "inherent in the equitable jurisdiction of the courts to order costs" (at para. 31).

The equitable test to meet can be found in *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003 SCC 71):

(1) Without the order, the moving party would be "deprived of the ability to proceed with the case";
(2) There is a "prima facie case of sufficient merit to warrant pursuit", which must be established by the moving party; and
(3) "Special circumstances must exist to satisfy the Court that the case is within a narrow class of cases where this extraordinary exercise of power is appropriate (*Hrvic* at para. 31).

However, courts have appeared to use their discretion to loosen the requirement of "special circumstances" and instead focus on evidence that the disbursements are both **necessary** and **reasonable** (*Hrvic* at para 33; *Samis (Litigation Guardian of) v. Samis*, 2011 ONCJ 273 at para 100). It will generally be important for the moving party to demonstrate specifically how the funds will be used.

Justice Sharma looked at the relationship between the husband and the construction company for which he claimed to just be an employee, and found that the evidence pointed toward there being a closer relationship between the company and the

husband than simply an employer-employee. For example, the company had paid the husband's vacation expenses and child support payments.

The court was also satisfied that given the wife's status and budget as a student, she required the interim disbursements to be able to pursue her claim.

The legal expenses that she outlined were also found to be necessary, based on the state of the wife's disclosure and pattern of non-compliance.

Part of these legal expenses involved preparing a critique of the reports that were to be prepared for the husband by a Chartered Business Valuator. The husband argued that awarding interim disbursements to cover this expense was premature, given that the reports had not yet been prepared and so there was no way to know whether a critique would even be necessary. Justice Sharma rejected this argument, as he was satisfied that based on the husband's conduct thus far, it was clear that the wife would need to undertake some form of external review of any report prepared by the husband (at para. 41).

The wife's success on her motion seemed attributable in part to the fact that she came prepared with a clear outline of the fees that she sought and what they would be used for. The husband on the other hand had clear omissions from his disclosure and a pattern non-disclosure that deemed the preparation of a report essential. The information in his financial statements clearly could not be accepted at face value.

It is important to note however, as Justice Sharma did, that meeting the test for interim disbursements is not the same as a determination on the merits of the parties' positions.

Additionally, Sharma J. made it clear that awards for interim disbursements are not intended to cover parties' personal costs during litigation – only the specific expenses that are incurred in relation to moving the matter forward.

Leading case law

Many recent cases continue to affirm *Stuart v. Stuart* (2001 CanLII 28261) as the leading case on interim disbursements in family law cases (*e.g.*, *Vohra v. Vohra*, 2023 ONSC 2443; *S.M. v. C.B.*, 2022 ONSC 340).

Stuart sets out the following "themes" in the case law applying to interim disbursements:

1. They are discretionary;
2. The moving party must demonstrate that they cannot proceed without the advance of the requested funds;
3. The expenses for which the fees are sought must be shown to be necessary;
4. The claim being advanced must have merit;
5. This discretion should be limited to "exceptional cases";
6. They may be granted in family law matters to "level the playing field"; and
7. Funds may be advanced against an equalization payment that will later become owing to the party (*Stuart* at para. 8).

Stuart strongly emphasizes the essential nature of full and proper financial disclosure in ensuring that a family law matter proceeds fairly. To this end, Justice Rogers emphasizes the importance of *both* parties being able to tackle the issue of disclosure on equal footing. It is clear that in cases like *Hrvic*, where one party is the higher income earner and has a more convoluted income situation, the other party is at a disadvantage in obtaining full disclosure.

While *Stuart* is not specifically cited in *Hrvic*, Justice Sharma opts to cite *Samis (Litigation Guardian of) v. Samis*, 2011 ONCJ 273 instead: A more recent case where Justice Sherr instead offers a summary of the state of the law on the direction to award interim disbursements, which includes the factors considered in *Stuart*.

One helpful note made by Justice Rogers in *Stuart* that is not highlighted in *Hrvic* is that "the leveling of the playing field [through interim disbursements] should not be

limited to those with an expected equalisation payment" (at para. 14), which goes back to the purpose underlying the awarding of interim disbursements. Given that these orders are aimed at allowing poorer litigants to pursue their legal claims, or at least, ensuring that they are not barred from pursing meritorious claims due to lack of resources, it does not make sense to bar their access to this equitable remedy where their rights may be at stake.

Themes from recent case law

A quick glance at some other recent case law suggests that many of the cases where litigants are successful in obtaining interim disbursements occur where the preparation and critique of business valuation and income analysis reports are deemed necessary. These reports are often needed where litigants are self-employed and operating through a corporation. They are not cheap, and often pose the only reasonable prospect of obtaining an accurate picture of a litigant's income.

In *Bartley v. Danso* (2023 ONCJ 284), the Respondent husband worked for a church, and his affairs were "so intertwined with the Church that it is impossible to know what belongs only to the Church and what belongs to the Church and the Respondent" (at para. 36). The income report prepared by the Respondent raised so many questions that the report itself was "on its face... of limited value" and required critique (at para. 47). Justice Sager awarded $25,000 in interim disbursements to fund this.

Therefore, a court will carefully review the proposed expenses that the funds are being requested to cover and will likely only award the quantum of disbursements that they deem to be appropriate or necessary.

Justice McDermot in *Vohra v. Vohra* (2023 ONSC 2443) ordered interim disbursements to cover the cost of responding to an income valuation and the costs of a lawyer through arbitration. However, the moving party had also requested

disbursements to cover the preparation of a vocational assessment, which Justice McDermot declined to order, as he would not fund a "fishing expedition."

Another theme seems to be that it is a *lack of liquidity* that is relevant to a determination of whether a party is in need of the disbursements. Specifically, a litigant does not necessarily have to be destitute in order to successfully obtain an order for interim disbursements.

This was the case in *S.M. v. C.B.* (2022 ONSC 340), where Justice Pinto awarded $186,000 in interim disbursements to an Applicant who owned several properties, but who did not necessarily have the liquidity necessary to fund the litigation.

While less recent, Justice Douglas' decision in *Rea v. Rea* (2016 ONSC 382) is helpful in so far as it provides a summary of the quantum of awards for interim disbursements that had been made. The following summary is provided at paragraph 16:

- *Belittchenko v. Belittchenko,* 2007 CanLII 20673 (ON SC), [2006] O.J. No. 5493, total interim disbursements of $217,616.
- *Lakhoo v. Lakhoo*, [2015] ABQB 357, interim disbursements of $400,000.
- Bagheri-Sadr v. Taghoub-Azari, [2011] ONSC 611, interim disbursements of $125,000.
- *J.K.L. v. N.C.S.*, [2009] O.J. No. 804, interim disbursements of $115,361.
- *Hughes v. Hughes*, [2009] ABQB 154, interim disbursements of $500,000.
- *Levina v. Levine,* [2014] O.J. No. 2238, interim disbursements of $100,000 upheld by Divisional Court.

Conclusion

Obtaining complete financial disclosure can be a long, arduous, and expensive process for family law litigants, but is a very important part of being able to obtain just outcomes. Interim disbursements can be used to help "level the playing field".

For the litigant seeking interim disbursements and their counsel, the case law in this area advises coming to court with a clear action plan. Namely, to carefully outline the expenses that you plan to incur and explain why they are necessary. The court will consider each expense in determining the appropriate quantum of an award for interim disbursements.

For the more financially comfortable litigant, the case law can serve as a reminder of the importance of producing income disclosure in a timely fashion, so as not to give the court any reason to suspect that they are not acting forthright. Interim disbursements are often awarded where the court believes that a litigant may not be revealing the whole truth about their income and finances.

So, when going to court to level the playing field, be sure to come prepared.