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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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When requesting financial disclosure, keep relevance and proportionality in mind

David Frenkel

Overview

The case of *Van Veen v. Van Veen* (2024 ONSC 743) reviews important family law principles of relevance and proportionality relating to financial disclosure. It also provides examples of specific requests and the reasoning the court used to either rule in favour of the claims or dismiss them. This article highlights the key take aways from the *Van Veen* decision and reviews related case law and principles on the topic.

Introduction

There are two competing themes in family law when dealing with disclosure issues: (1) full and frank disclosure, and (2) relevance and proportionality.

On the one hand, lawyers are expected to advise clients that as per the *Family Law Rules* they need to produce full and frank disclosure when the opposing party makes their requests.

On the other hand, as pointed out in *McDowell v. McDowell* (2021 ONSC 1954) there is also an element of proportionality, common sense and fairness built into the rules themselves so that the evidence can "contribute to the fact-finding process".

In *McDowell*, Justice Price reminds us that excessive disclosure can be as harmful as non-disclosure. "It can confuse, mislead or distract the trier of fact's attention from the main issues and unduly occupy the trier of fact's time and ultimately impair a fair trial."

Price J. clarified two important points:

1) Proportionate disclosure is what falls between the two extremes of inadequate disclosure and excess demands for disclosure.

2) The facts in each case will dictate whether disclosure requests fall within the scope of proportionality.

Moreover, the failure to apply the principle of proportionality impedes the progress of the proceeding, causes delay, and generally acts to the disadvantage of the opposite party. It also impacts the administration of justice, as unnecessary judicial time is spent, and the final adjudication is stalled. (*McDowell* at para. 37 with reference to *Roberts v. Roberts,* 2015 ONCA 450)

Lawyers are therefore encouraged to review and reflect on the general principles of proportionality and relevance when they make disclosure requests and also when they respond to them.

However, it is often not straightforward to apply general principles to the specific requests themselves. For example, is asking for five years of bank statements prior to the date of separation enough or too much? What about dealing with a self-employed client: how many years of past invoices relating to their business is considered excessive?

The above questions are not easy to answer, hence the reason that motions are regularly brought to seek judicial intervention.

Therefore, a good first step in becoming more comfortable in advising clients on these issues is reviewing case law that deal with various types of disclosure requests. Such cases generally provide the legal basis that judges use to grant or dismiss the requests. And the more one reviews such reported decisions, the clearer those legal principles will be.

The following article reviews the recent decision of *Van Veen v. Van Veen* (2024 ONSC 743). *Van Veen* carefully assesses specific disclosure requests and summarizes the general principles that should be useful for counsel in their own cases.

***Van Veen v. Van Veen* (2024 ONSC)**

Van Veen v. Van Veen (2024 ONSC 743) is a recent example where a court analyzed disclosure requests and found that the requesting party, to say the least, went too far in her requests.

In *Van Veen*, the husband claimed that the wife "engaged in a campaign of relentless and ongoing requests for disclosure". According to the husband, the wife

> …often hyper-focuses on irrelevant or minor details" and then relies on those details to assert that the respondent is "dishonest and/or hiding assets."

What was noteworthy, was that the husband did not own a business, was employed by a government agency and yet one of Requests to Admit that the wife served on the husband comprised of 2,099 questions. Also, as of the date of the motion, the husband had provided a total of 2,400 pages of disclosure and served six financial statements.

Justice Mitrow held that "proportionality and common sense must be considered when ordering disclosure." In referencing *Boyd v. Fields*, (2006 CarswellOnt 8675 (Ont. S.C.J.)),

> Full and frank disclosure is a fundamental tenet of the Family Law Rules. However, there is also an element of **proportionality, common sense, and fairness** built into these rules. A party's understandable aspiration for the utmost disclosure is not the standard. Fairness and some degree of genuine relevance, which is the ability of the evidence to contribute to the fact-finding process are factors. I also observe that just as non-disclosure can be harmful to a fair trial, **so can excessive disclosure be harmful because it can confuse, mislead or distract the trier of fact's attention from the main issues and unduly occupy the trier of fact's time and ultimately impair a fair trial**. (emphasis added)

The court dismissed most of the wife's request for disclosure and the following are some examples where the court assessed and ruled on specific disclosure requests.

1) **Updated and corrected address**
    - The wife claimed that the husband had out-of-province real estate holdings and that the husband's original Teraview search was only for one county and that the earlier corporate names searched were only for entities that the husband knew that the wife was "aware of".
    - The court ruled that there was a "**complete dearth of any credible evidence, documentary or otherwise, supporting these allegations**."

2) **Disclosure regarding corporate entities in other provinces**
    - The husband already disclosed all interests in any corporate entities that he was associated with.
    - The court dismissed the wife's claim indicating that her belief that the husband has interests in extra-provincial corporations was "**prompted by baseless speculation**."

3) **Leases and mortgages**
    - The wife sought disclosure as to lease/mortgage/lien particulars for all properties held by the husband personally or through corporate entities in various provinces.
    - The court dismissed the request again due to it falling within the category of "baseless speculation". The husband's response was that he only had personal mortgages and that they were known and disclosed in his financial statements.

4) **Monthly investment statements**
    - The wife sought monthly statements of the husband's investments for a year that a previous court order already addressed. Namely, the court order required statements from January 1, 2016 and onwards while the wife wanted the statements from January 1, 2015 as well.

  - The court dismissed the wife's request noting that there was no evidence from the wife explaining why the disclosure should predate January 1, 2016.

5) **Security options noted in tax returns**
  - The husband's notice of assessment showed security options deducted in the amount of $295. The husband could not explain the deduction but still confirmed that he did not own stock options other than registered investments which he already disclosed in his financial statements.
  - The court held that despite the husband's evidence was difficult to understand. However, since the amount on the assessment was negligible, the court dismissed the wife's request. The court noted that "common sense and proportionality must prevail" and that it found **"no useful purpose" being served in requiring the husband to spend further time, effort and costs in relation to the disclosure requested**.

6) **Monthly statements for financial accounts**
  - The wife requested 9 years of "'financial accounts' that receive, purchased or held securities that were derived from exercising stock options 'along with all other investment products held at these institutions.'"
  - The wife's request was dismissed with the court noting that it had "no merit" since the husband already deposed that he did not own stock options, except as may be owned through registered investments.

7) **<u>Monthly statements from financial institutions including credit card statements from all accounts from any and all corporate interests</u>**

   - The wife requested statements in addition to a period already addressed from a previous court order.
   - Justice Mitrow dismissed the wife's requests noting that her request for additional disclosure was unnecessary and **appears to be designed to "burden the respondent with the cost of further productions that are neither necessary nor relevant**."

8) **<u>Monthly invoices from all revenue generating contracts and monthly statements for all payments received</u>**

   - The wife requested an additional year of the following which predated an existing order for similar information:
     - (a) invoices from all revenue generating contracts held by the husband personally or through a corporation; and,
     - (b) monthly statements from banks or other financial institutions for all payments received from clients of the husband, personally or through corporations.
   - The court dismissed the wife's request due to no merit to the request.

9) **<u>Monthly statements from all payment processing financial institutions including Square, PayPal and TSYS</u>**

   - The wife requested the above statements for the last eight years. The husband responded and claimed that he did not receive funds from any payment processing institution. Rather, all payments from the company in question were received directly to his CIBC account.
   - The court dismissed the wife's request as again there was no merit to it.

10) "Income and Deduction" printouts directly from CRA

- The court dismissed the wife's request noting that the husband already provided significant tax disclosure via his income tax returns and notices of assessment and thus her request was redundant. Namely, the information sought was already included in the tax documents provided and that her request would serve only to force the husband to incur "needless time, effort and legal expenses."

11) Use-of-home receipts

- The wife's request related to matrimonial home expenses that she sought to deduct for income tax purposes, including internet expenses, smoke/alarm systems expenses and snow removal. The wife planned to use these receipts to reduce her income in the years prior to separation by claiming them as business expenses.
- The court did not order for the husband to provide the receipts, but rather for him to sign a direction allowing the wife to contact the service providers directly. The court reasoned that if the wife required certain receipts or invoices to finalize or amend her tax returns, then she should be the one contacting all the service providers directly.

12) All correspondence between CRA and the husband or his representatives or agents

- The wife requested the above correspondence regarding the husband personally or in relation to his corporate interests for the last eight years.
- The court dismissed the wife's request. The court reasoned that the husband's evidence was that he had no correspondence with CRA "whatsoever since separation" and that he had received only automated notifications confirming, for example, that his tax returns were filed.

- The court held that the wife's request exceeded the bounds of relevancy and proportionality, and that the information sought was redundant and unlikely to add anything of value or relevance to the tax disclosure already provided. The husband made substantial tax disclosure and there was no evidence or allegation that the CRA correspondence included anything other than routine matters.

The wife made several other requests for various types of disclosure that the court also dismissed, noting that the requested disclosure was bordering on being frivolous, vexatious, contrived and based on facts that did not exist.

General Principles

With respect to disclosure issues, there are important principles in the family law context to consider.

For starters, courts and parties should consider the burden that disclosure requests bring on the disclosing party, the relevance of the requested disclosure to the issues at hand, and the costs and time to obtain the disclosure compared to its importance. (*McDowell v. McDowell*, 2021 ONSC 1954 at para. 31)

In determining when a party's disclosure requests are proportional, it is critical to ensure that the disclosure requested can be closely tied to the issues at the heart of the proceedings, and that the manner in which a certain item of disclosure will shape the analysis of those issues can be articulated. (*McDowell v. McDowell*, 2021 ONSC 1954 at para. 32)

As a simple reminder, it would help to provide the court with a clear and concise list of disclosure being sought (*P.M. v. B.M.*, 2024 ONSC 1297 at para. 23).

Also, the correspondence by which requests are made for additional disclosure should invite the party being asked to produce documents. In the event he/she fails to produce a document, the party should provide an affidavit indicating

> (a) whether the document ever existed or was in the party's possession;
>
> (b) when it ceased to be in the party's possession; and
>
> (c) what requests were made for the documents from any third parties believed to be in possession of them, giving the contact information, copies of the requests and the replies received, and the reasons the document could not be produced. (*McDowell v. McDowell*, 2021 ONSC 1954 at para. 21)

The ease of obtaining documents can be a factor in a court ordering their production. For example, requesting copies of statements should be avoided if the client requesting them is able to obtain the statements themselves (such as a joint account, or a party having signing authority to obtain statements themselves). (*P.M. v. B.M.*, 2024 ONSC 1297 at paras. 11, 13, 22)

Monthly statements of bank and credit cards for three years prior to the date of separation seems to be a typical request. But sometimes, qualifications for such requests must be considered. For example, limited redactions of bank statements may be appropriate in circumstances where there is a need to protect a client's privacy (e.g. allegations of domestic violence). (*P.M. v. B.M.*, 2024 ONSC 1297 at paras. 20 and 41)

In *Ellis v. Ellis* (2024 ONSC 512), Piccoli J. dismissed the husband's request for copies of the wife's worldwide bank statements, investment accounts, credit cards, mortgages and lines of credit for the last five years. The court reasoned that there was no suggestion that the wife earned cash income and as such the request was overreaching.

Finally, court enforcement of disclosure obligations should rarely be brought before exhausting reasonable efforts to secure the other party's co-operation with requests

for additional disclosure through correspondence and communication. (*McDowell v. McDowell*, 2021 ONSC 1954 at para. 20)

Conclusion

A request for disclosure is typically one the first steps that a lawyer takes when starting a family law file.

Most of the time, the disclosure is reasonable, necessary and is generally complied with in a timely fashion.

However, there should be limits on what a lawyer asks from the opposing counsel and what a lawyer should be expected to respond to.

Counsel should try to avoid a mindless exercise of asking for every disclosure that they can think of, being careful not to copy and paste disclosure requests from other files without adjusting the list to be specific to the new client.

Rather, thoughtfulness is key.

And such thinking should be applied when making the request and responding to them.

When we make the request, consider which disclosure is actually necessary to help you advise your client on the important issues. If most likely a certain piece of disclosure is going to have minimal impact on a case, consider not making it.

Similarly, when you are faced with a number of seemingly senseless requests from the opposing party, instead of simply advising your client to produce them, perhaps try and understand the basis of the requests in the first place.

One way is to call the opposing counsel and ask why a certain document or series of documents were requested and the purpose for the request. After the discussion, the opposing counsel may have a point and their rational reasonable.

Such a discussion may assist you in not only understanding the reasons for certain disclosure requests but also developing a rapport that can help both counsel in their negotiations to settle the matter sooner and in a more collegial fashion.

The discussion between counsel may also assist everyone to be more invested in the process and to appreciate each side's goals and objectives rather than trivializing them.

And even if counsel end up disagreeing on certain disclosure requests, those disagreements may be more limited in scope and ultimately costing the clients less in having to argue them in court.

Using the above approach may also result in counsel having more of an intellectual disagreement rather than a shouting match where egos often lead the way.

Thoughtful discussions are usually beneficial not only for the lawyers but clients as well.

By learning from one another in the financial disclosure process, an effective result can be achieved that benefits the clients, rather than adding to their stress and frustration within an already complicated legal system.

Offers to settle: looking beyond subrule 18(14) of the *Family Law Rules*

Christina Hinds

Overview

When bringing a motion for interim relief, serving an offer to settle is an important step. An offer to settle should not be an afterthought served in the days leading up to a motion and after significant costs have already been incurred in drafting and research.

*Shirley v. Wellingt*on (2024 ONCJ 128) is a recent cost decision of Justice Sherr following the mother's successful motion for temporary decision-making responsibility and child support. The mother sought her full recovery costs of $5,763. Justice Sherr considered subrule 18(14) of the *Family Law Rules* and the court's discretion in awarding costs. Justice Sherr ultimately awarded the mother costs in the amount of $4,400.

The mother's offers to settle

In *Shirley v. Wellingt*on, the mother served two offers to settle prior to the motion. The first was a severable offer to settle and required the terms to be accepted on a final basis. It was served several months before the motion date.

The mother's second offer to settle was severable and required acceptance of its terms on a temporary basis. It was served the day before the motion.

Legal Considerations

After discussing the fundamental purposes of costs set out by the Court of Appeal in *Mattina v. Mattina* (2018 ONCA 867) and the principles of reasonableness and

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proportionality in determining costs set out in *Beaver v. Hill* (2018 ONCA 840), Justice Sherr considered the mother's offers to settle with reference to subrule 18(14) of the *Family Law Rules.*

Justice Sherr first considered whether the mother's offers to settle were within the scope of the motion. While the mother argued that her first offer attracted the costs consequences set out in subrule 18(14) of the *Rules*, Justice Sherr disagreed. As the offer required acceptance of its terms on a final basis, the offer extended beyond the scope of the motion (at paras. 13 and 14).

At paragraph 15, Justice Sherr referred to his earlier comments in *Swaby v. Foreshaw* (2024 ONCJ 111) on the same issue:

> The mother's offer to settle did not attract the costs consequences set out in subrule 18(14). It contained terms that extended beyond the scope of this motion and required acceptance of its terms on a final basis. The mother should have made an offer to settle the discrete issue on this motion.

Subrule 18(14) of the Family Law Rules

The cost consequences of a party's failure to accept an offer to settle are set out at subrule 18(14) of the *Family Law Rules*:

> A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:
>
> 1. If the offer relates to a motion, it is made at least one day before the motion date.
> 2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
> 3. The offer does not expire and is not withdrawn before the hearing starts.
> 4. The offer is not accepted.

5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

The mother's second offer to settle met the preconditions of subrule 18(14). At paragraph 20, Justice Sherr noted that, "even if all the preconditions set out in subrule 18(14) are met the court has the discretion not to apply the costs consequences set out – to order otherwise."

Serving an offer to settle on a self-represented party

The father was self-represented. In determining costs, Justice Sherr considered the importance of timely service on a self-represented party with reference to the primary objective of the *Family Law Rules* to deal with cases justly (citing *Abrahiumkhill v. Khaled*).

In *Abrahiumkhill v. Khaled* (2022 ONCJ 324), the court wrote at paragraphs 20 and 21 that:

> **In determining what constitutes a reasonable period of time, counsel should also expect that courts will require offers upon self-represented litigants to be served earlier than the minimum times set out in subrule 18 (14)**. Rule 2 provides that courts have an obligation to ensure that self-represented litigants are dealt with justly. Counsel are also required to help the court promote this objective. See: subrule 2 (4). Dealing with a case justly includes ensuring that the procedure is fair to all parties. See: clause 2 (3) (a).
>
> **Making an offer to settle to a self-represented litigant that permits only one day for acceptance before costs activate may have some value as a litigation tactic, but it has little probative value for this court when determining whether to apply subrule 18 (14).** The respondent was not given sufficient time to consider the offer or to obtain advice. The offer did not meet the primary objective to deal with cases justly set out in rule 2. (emphasis added)

Complexity of the motion

Even if both parties are represented by counsel and the preconditions of subrule 18(4) are met, the court may still exercise its discretion and refuse to apply the cost consequences of subrule 18(14) of the *Family Law Rules*.

Regardless of the timelines provided in subrule 18(14), offers should be served a reasonable period of time before the motion. What constitutes a reasonable period of time will depend on the complexity of the case. Counsel must keep in mind that a party requires sufficient time to process an offer to settle and make an informed decision (at para. 23).

In *E.H. v. O.K.* (2018 ONCJ 578), both parties were represented by counsel and the offer to settle met all the preconditions of subrule 18(4). The court held that:

> Parties require a reasonable period of time to process and make an informed decision about whether to accept an offer. See: Oduwole v. Moses, 2016 ONCJ 653. What constitutes a reasonable period of time will depend on the complexity of the case.
>
> These were complex motions. The mother's offer to settle should have been served much earlier (closer to the 7 day time requirement for a trial) – particularly since the hearing of the motions had been scheduled in January, 2018.
>
> **Rule 2 (dealing with cases justly) applies when a court is determining whether to "order otherwise" with respect to a subrule 18 (14) offer. Making an offer to settle that is only open for one day before a complex motion is to be heard may have some value for parties as a litigation tactic, but will have little probative value for this court when determining whether to apply subrule 18 (14).** The court finds that it would not be just for it to fully apply the costs consequences of subrule 18 (14) in these circumstances. (at paras. 26 – 28)

The date that the motion was scheduled is also a relevant consideration. In *E.H. v. O.K.*, the motions to change were scheduled in January 2018 and heard over four half-days

between April and June 2018. The court explained that given the complexity of the issues, the offer should have been served much earlier and "particularly since the hearing of the motions had been scheduled in January, 2018."

Decision

While the issues were important to the parties, the issues to be determined were not complex or difficult (at para. 33). However, the father was self-represented and needed more time to process the mother's offer to settle and make an informed decision (at para. 25).

Otherwise, the mother's behaviour was reasonable, and the fees claimed by her lawyer were reasonable. Justice Sherr found that father's behaviour was unreasonable – he took unreasonable positions on the motion, including requesting to pay less child support than provided for by the *Child Support Guidelines*. At paragraph 38, His Honour noted that "It is important to send the message to the father that litigation is expensive. If he takes unreasonable positions he will have to bear the cost."

Justice Sherr ultimately awarded the mother her costs in the amount of $4,400 with reference to subrule 24(12) of the *Family Law Rules.*

Conclusion

Motions can require significant preparation. When preparing motion materials, an offer to settle should not be an afterthought. While a reasonable offer to settle may avoid the need for a motion altogether, including the cost and time of preparing of motion materials, it also serves to protect litigants from cost consequences.

Lawyers must turn their mind to settlement as early as possible – an offer to settle an interim motion should not be considered only after the motion materials have been prepared and the motion date is approaching.

Lawyers must look beyond subrule 18(14) of the *Family Law Rules* to ensure that they are adequately protecting their clients. As highlighted by Justice Sherr, timing of service should be considered with reference to the complexity of the issues and the opposing party.

Maintaining the status quo: legal principles when attempting to make changes on an interim basis

Samantha Rich

Overview

Justice Breithaupt Smith's decision of *Stanway v. Stanway* (2024 ONSC 477) affirms the long-standing rule that the *status quo* of a parenting schedule should not be lightly departed from, especially on an interim basis. A party has a high threshold to meet to successfully convince a judge to depart from the *status quo*. The court will only depart from an existing situation if it is proven to be clearly in the child's best interests. The principles of maintaining the *status quo* and continuity of care are important factors in the best interests analysis, but are not the sole determinative factors. A party wishing to change the *status quo* on motion will need to ensure that they place compelling evidence before the court to meet the high threshold required to disrupt it.

Background of Stanway v. Stanway

The parents of an elementary school-aged child each brought a motion to address parenting time, decision-making responsibility, and child support. The parties were governed by a Separation Agreement, dated March 8, 2019. The terms of the Separation Agreement included joint decision-making, with the mother having the final authority, and shared parenting in the Region of Waterloo.

The mother argued that the existing situation was that the child had not been in the father's care on weekday overnights since mid-2020 at the time of the hearing. She argued that this created a *status quo* that should not be lightly interrupted on motion. The father disagreed, stating that the combination of the COVID-19 situation,

negotiations between counsel, and court delays ought not to be a sufficient foundation upon which to base a *status quo*. (at para. 6)

Status Quo Analysis

Justice Breithaupt Smith held that we must first analyse: (1) whether a *status quo* has been established; and (2) if established, the legal test for changing it on an interim basis (at para. 11).

(1) Has a Status Quo Been Established?

The first step of the analysis is whether a *status quo* has been established. Once you meet this threshold, you can move on to the second part of the test. In *Stanway v. Stanway*, Justice Breithaupt Smith found that a *status quo* had been established.

She cited Justice Benotto's decision of *Davis v. Nusca* (2003 CanLII 2301 (ON SCDC)), who stated that "… it is clear as well that the *status quo* relates not so much to a location as to the continuity of care..." (at para. 9). The court affirmed the preference of the child remaining in the care of the parent who had been the primary carer for the child at the time of the hearing, as this is the child-focused approach.

The court also cited *Grant v. Turgeon* (2000 CanLII 22565 (ON SC)) where Justice MacKinnon reasoned that a *status quo* required consistent residency and was difficult to discern where there was "… factual controversy as to when the children were with each parent." (at para. 13)

Breithaupt Smith J. found that in the matter before her, there was no factual controversy. She stated that, "… [the child] has been in [the] Mother's primary care and has spent alternate weekends and a mid-week evening visit with [the] Father continuously for more than three years. From [the child's] perspective - which is the court's focus in assessing his best interests - he lives primarily with his Mother in Kitchener and visits his Father in Ingersoll. I find that this is the *status quo*." (at para. 14)

The court affirmed the principles of maintaining the *status quo* and continuity of care pending trial.

(2) When Should a Status Quo be Changed on a Temporary Basis?

The second step of the analysis is to determine the legal test for changing the *status quo* on an interim basis.

The court cited Justice Dambrot's decision of *S.H. v. D.K.* (2022 ONSC 1203) in setting out the test for changing the *status quo* on a motion. It is clear that the court has established a high threshold for departing from the *status quo*, especially on an interim basis.

In *S.H. v. D.K.*, the divisional court at paragraph 26 of its decision stated that, "Parenting arrangements may be informal, they may arise from a separation agreement, or they may be fixed by an interim or final judicial order." It cited Justice Pazaratz's decision at paragraph 52 in *F.K. v. A.K.* (2020 ONSC 3726), affirming that when assessing whether a parenting arrangement should be varied, "… courts must exercise caution before changing an existing arrangement which children have become used to." This caution is warranted given the disruption that would ensue if the *status quo* were to be departed from pending a final decision where the parenting schedule may be changed once again.

S.H. v. D.K. also cited the decision of *Grant v. Turgeon*, where Justice MacKinnon stated at paragraph 15 that, "… generally, the *status quo* will be maintained on an interim custody motion in the absence of compelling reasons indicative of the necessity of a change to meet the children's best interests. This is so, whether the existing arrangement is de facto or de jure." Thus, parents wishing to change the *status quo* on motion will need to ensure that they place compelling evidence before the court to meet the high threshold required to change the *status quo*. The court also cited Justice Benotto's decision of *Davis v. Nusca*, where she stated at paragraph 8

that "… there is the basic principle of maintaining the status quo until trial which is extraordinarily important in family law cases…"

In *S.H. v. D.K.,* the court further cited Justice Pazaratz's decision in *F.K. v. A.K.* in affirming the stringent analysis required when assessing whether a final order should be temporarily varied at paragraph 27:

> … the need to exercise caution is heightened where the existing parental arrangement has been determined by a court order, and that the level of required caution is further heightened if the court is being asked to change a final parenting order on a temporary basis. While the court has the authority to grant a temporary variation of a final order in the appropriate circumstances, **the evidentiary basis to grant such a temporary variation must be compelling**. The onus is on the party seeking a temporary variation to establish that in the current circumstances the existing order results in an untenable or intolerable situation, jeopardizing the child's physical and/or emotional well-being, and that the proposed new arrangement is so necessary and beneficial that it would be unfair to the child to delay implementation. (emphasis added)

Thus, a parent seeking to change the *status quo* would have to prove that at a minimum the current parenting schedule is 'jeopardizing the child's physical and/or emotional well-being'.

S.H. v. D.K. also held at paragraph 28 that, "The imposition of a stringent test for the granting of a temporary variation of a final parenting order of a court is sound in principle, since the purpose of an interim or temporary order is simply to provide a reasonably acceptable solution to a difficult problem until trial, when a full investigation will be made... There is a long line of cases prior to the decision in *F.K. v. A.K.* that insist on a stringent test..."

Justice Breithaupt Smith summarized the divisional court in *S.H. v. D.K.* and warned courts to exercise caution:

> Thus, the court is to exercise caution, and to generally maintain the *status quo* unless compelling reasons necessitate a change to meet a child's best

> interests. The reason is simple: children ought not to be bandied about between households while the litigation unfolds. Family circumstances fluctuate, and the wheels of justice turn slowly: from a child-focused public policy perspective, ever-changing parenting plans are not in the best interests of children whose lives have already been completely disrupted by their parents' separation. (at para. 16)

Factors to be considered

The court will assess the matter as a whole to determine whether the *status quo* ought to be maintained or departed from in the child's best interests. The courts have determined a number of factors which should be assessed when making such a determination.

Justice Breithaupt Smith stated that there is greater flexibility where the *status quo* arises from the "lived reality", i.e. the current parenting schedule, having regard to the delays occasioned by negotiation and litigation post-separation. She then went on to list the factors which should be considered when embarking on an assessment to change the *status quo* arising from the "lived reality" at paragraph 18:

- whether the parent seeking the change objected to the arrangement at its outset;
- what steps were taken by the parent seeking the change, including attempts at negotiation or mediation;
- whether the parent seeking the change commenced litigation quickly following the hardening of the parties' positions;
- how closely the parenting proposal made by the parent objecting to the *status quo* resembles the children's lived experience pre-separation or, if applicable, immediately post-separation;
- how much time has elapsed;
- how each parenting proposal impacts upon the children's day-to-day lived experience; and
- the children's views and preferences, where they can be reasonably ascertained.

Justice Pazaratz in his decision of *M.C. v. N.M.* (2014 ONSC 2048) provided an additional list of factors which should be assessed in determining whether the *status quo* should be varied temporarily and the objectives which should be borne in mind when making a determination:

> There is no presumption in favour of the *status quo*, but it is an important factor, perhaps more so in relation to temporary orders. Among the considerations in determining a final custody order:
>
> > a. The length of time the arrangement has existed, and,
> >
> > b. The extent to which the existing arrangement is or has been beneficial to the child.
> >
> > c. The impact of discontinuing the existing arrangement on the child's emotional or psychological health.
> >
> > d. The impact of a proposed new arrangement on the child's emotional or psychological health.
>
> …
>
> Among the obvious objectives:
>
> > a. Don't disrupt or jeopardize routines, arrangements or relationships which are benefiting the child.
> >
> > b. Maintain as much consistency and continuity in a child's life as possible, relating not only to family dynamics, but also community connections such as friends, neighbourhoods, schools, medical services, etc.
> >
> > c. Children in custody disputes have often already experienced the emotional trauma of instability, conflict, and disruption. If their circumstances are now stable, they should not have to experience more changes without compelling reasons.
> >
> > d. Children - especially young children -- need stability and consistency. They benefit from routine. Anecdotally they are often described as "resilient to change", but child care professionals warn that such complacency is usually unwarranted.
> >
> > e. Courts are understandably reluctant to abandon an arrangement which is working to a child's benefit, in favour of a speculative arrangement.

> f. Although it may sound like a gross oversimplification, in considering the *status quo* there is a very real sense of "don't tamper with success." (at paragraphs 331 - 332)

Conclusion

It is clear that courts place a lot of weight on maintaining the *status quo* and continuity of care. Therefore, in order to be successful with changing the *status quo*, counsel will need to present a strong case with clear evidence to warrant it.

The kinds of cases which would likely be successful would be where the *status quo* is clearly not in the child's best interests.

Still, parents seeking to enforce the existing state of affairs need to come to court with clean hands. The *status quo* should not be artificially created for the purposes of a litigation strategy.

Also, the *status quo* alone is not determinative of whether a variation of the parenting time is in the child's best interests. As pointed out by Justice Pazaratz, there is no presumption in favour of the status quo.

Nevertheless, in light of the consistent emphasis by judges to consider the status quo in their reasoning, it is a principle not to be taken lightly.

Calculating fairness: determining entitlement to occupation rent

Ainsley Doell

Overview

Must parties demonstrate that there are 'exceptional circumstances' in order to succeed with a claim for occupation rent? This article considers this question by looking at recent decisions in *K v. H* (2023 ONSC 1612), *Mansfield v. Kolinski* (2024 ONSC 553), and *Chhom v. Green* (2023 ONCA 692), and comes to the conclusion that occupation rent remains a highly discretionary remedy to be considered in the broader context of a matter.

Introduction

It is widely accepted that after separation, both parties are typically economically worse off than they were during marriage or cohabitation. This new economic reality is felt acutely by parties who vacated the matrimonial home, and who now have a whole host of other living expenses, sometimes in *addition* to the expenses that they continue to pay for the matrimonial home as a joint asset.

When the other party remains in the matrimonial home, this can lead to a sense of unfairness and resentment. One way in which parties may seek to alleviate this sense of injustice and economic disadvantage is through a claim for occupation rent, wherein the occupying spouse would pay the non-occupying spouse for their continued use of the matrimonial home. There may be a sense among non-occupying spouses that this is "only fair" in circumstances, however, the law does not always agree.

There is no automatic or statutorily-derived entitlement to occupation rent between spouses in Ontario. An order for occupation rent is a discretionary remedy, but the

case law is inconsistent as to whether it should be reserved for exceptional circumstances, or simply available wherever it is deemed equitable on a holistic consideration of the circumstances.

This should have been clarified in Ontario after the 2023 Ontario Court of Appeal decision in *Chhom v. Green* (2023 ONCA 692), but this does not appear to be the case.

This article looks at the recent decision in *K. v. H* (2023 ONSC 1612), where Justice McGee discusses the current state of the law on occupation rent, applying the *Chhom* decision. However, the article will also look at *Mansfield v. Kolinski* (2024 ONSC 553), released in January, wherein Justice Nieckarz finds, contrary to *Chhom*, that such orders are only to be made in exceptional circumstances.

The aim of this discussion is to help clarify the current state of the law around occupation rent, and to assist family law lawyers in understanding how to advance these claims on behalf of their clients and assess the strength of these claims.

Analyzing a claim for occupation rent

a. K v. H: a recent claim

The parties in *K. v. H* were in the midst of a litigious separation. This decision marked the end of the second trial between the parties, and Justice McGee noted that her reasons do not mark the end of the litigation (at para. 6).

This discussion will focus on only one of the issues that was outstanding between the parties at the time of this second trial, namely, the wife's "claim for occupation rent in the face of an agreement for post separation adjustments" (at para. 17).

The wife had continued to reside in the matrimonial home with the parties' two daughters following separation. Title was solely in the husband's name, and the

husband left the country before the resolution of any of the legal or financial issues arising from the separation. At trial, he asked for $114,400 in occupation rent for the period from separation in December 2019 to trial in October 2023.

As part of these proceedings, the wife's claim of resulting trust over a 50% interest in the matrimonial home was successful. The evidence demonstrated that title was taken in the husband's name only to preserve the wife's access to a first-time homeowner's benefit, on the advice of a broker (at para. 92).

The parties had also already agreed that the wife would pay the husband a post-separation adjustment of $70,997.59, to compensate him for expenses he had paid, many — but not all — of which were for the maintenance of the matrimonial home. This included payments for condo fees, gas, electricity, home insurance, etc. (at para. 116).

b. Discretionary factors

K v. H is a 47-page decision, but the husband's claim for occupation rent is dealt with rather swiftly.

Justice McGee asserted that "occupation rent is a discretionary determination available to a trial judge when it is "reasonable and equitable" to do so", citing *Griffiths v. Zambosco* (2001 CanLII 24097 (ONCA)) to support this proposition.

The factors to be considered in determining whether it would be "reasonable and equitable" also come from *Griffiths v. Zambosco*, and are as follows:

(1) The **timing** of the claim for occupation rent;
(2) The **duration** of the occupancy;
(3) The **inability** of the non-resident spouse **to realize on their equity** in the property;
(4) Any **reasonable credits** to be set off against occupation rent;
(5) And any other **competing claims** in the litigation.

How these factors are to be weighed against each other, and whether there are other relevant factors to be considered, is up to the discretion of the trial judge (*K v. H* at para. 117).

These are the same factors that were cited by the Court of Appeal in *Chhom*, and other recent case law.

Higgins v. Higgins (2001 CanLII 28223 (ON SC)) added some more factors to this list. *Higgins* was not cited by Justice McGee, but did make a recent appearance in *Mansfield v. Kolinski*. These additional factors include:

(1) The **conduct** of the spouses (including the failure to make support payments);
(2) Whether the non-occupying spouse **moved for the sale** of the home (or, why they did not);
(3) Whether the occupying spouse paid the mortgage and other **carrying costs** of the home;
(4) Whether there are **children** in the home; and
(5) Whether the occupying spouse has **increased the value** of the home.

(*Higgins* at para. 53).

The central question to ask when applying these factors appears to be, *is there an injustice that would be remedied by an award of occupation rent*?

In the case of *K v. H*, the answer was no. This was in large part due to the post-separation adjustment that the parties had agreed to, and the finding that the wife had a beneficial interest in half of the matrimonial home.

An order for occupation rent is a "tool for balancing the equities", and must be "assessed in relation to the affairs of the whole family" (at para. 114).

While seems that it is possible that the husband could have been successful in his claim for occupation rent in similar circumstances (absent the post-separation

adjustment), Justice McGee makes it clear that this payment that the parties had agreed to was enough to "offset any benefit" that the wife would have enjoyed from her exclusive possession of the property (at para. 119).

The specific enumerated factors are considered in more detail in *Mansfield v. Kolinski*, where Justice Nieckarz considers the following:

- There was insufficient evidence that the occupying spouse's conduct forced the non-occupying spouse to leave;
- The non-occupying spouse did bring an application seeking the home's sale, and it is the occupying spouse that delayed the sale;
- The non-occupying spouse was paying carrying costs;
- The occupying spouse had renovated the home and would not be receiving an additional credit to his equity for this contribution; and
- All of the above factors had been factored into a separate unjust enrichment analysis (at para. 93).

Justice Nieckarz ultimately finds that an award of occupation rent is not appropriate. This decision is consistent with *K v. H*: In the face of factors weighing against and in favour of the non-occupying spouse's claim, the most important piece of the puzzle is that these factors in favour of the non-occupying spouse have already been considered elsewhere, and they have therefore already been compensated or otherwise accounted for.

c. Requirement of "exceptional circumstances"

Justice McGee begins her analysis in *K v. H* by citing *Chhom v. Green* for the proposition that claims to occupation rent are "no longer restricted to exceptional cases". While this does appear to be a new development, she makes it clear that this does not mean that there is an automatic entitlement on behalf of the non-occupying spouse (at para. 114).

This is interesting, because in *Chhom*, the Court states that "while it is settled law in Ontario that an order for occupation rent be reasonable, it need not be exceptional", and cites *Griffiths v. Zambosco* to support this idea (at para. 8). The Court of Appeal appears to disagree with the existence of this requirement for 'exceptional circumstances' altogether, but Justice McGee suggests that the *Chhom* decision has changed the state of the law in this area.

Looking back to *Mansfield v. Kolinski*, decided just two months before *K v. H* and months after *Chhom*, Justice Neickarz asserted that claims for occupation rent made by one spouse against another "will be granted in exceptional circumstances" (at para. 90). She cites *Ombac v. George* (2015 ONSC 1983) in support.

In *Ombac*, Justice Chiappetta elaborated that where one spouse is a joint owner of the matrimonial home but enjoys exclusive possession of the property, the other spouse is entitled to compensation. However, "compensation" does not necessarily mean "occupation rent". The non-occupying spouse must be able to make out that the other remedies that may be available, such as gaining possession of the property or receiving support from the occupying spouse, are not in fact available to them (at para. 33).

Justice Chiapetta states that this is the "exceptional case", but if this is what is meant by "exceptional", this does not actually sound all that different than the factors that are enumerated in *Griffiths v. Zambosco*. It may be that the loosening of this 'exceptionality' requirement does not make that big of a difference at all.

d. Is title relevant?

A spouse advancing a claim for occupation rent certainly needs to be a titled owner. However, the occupying spouse can be titled or non-titled. Likely, they just need to have exclusive possession, such that they are a rightful occupant of the home and the non-occupant spouse cannot otherwise remove them.

In *K v. H*, the husband was the sole titled owner and advanced his claim for occupation rent against the non-titled occupying wife. Ultimately, the wife was found to have a beneficial interest in the property. In *Mansfield v. Kolinski*, the parties held title as joint tenants.

Title does become relevant when determining the amount of occupation rent that one may be entitled to. According to *Ombac v. George*, where the occupying spouse is a joint owner, the non-occupying spouse may be entitled to "one-half of the rent that the premised would attract, less one-half of the taxes and insurances for the period of possession" (*Ombac* at para. 33).

Evidence to support a claim for occupation rent

In *Mansfield v. Kolinski*, Justice Neickarz stated that "a list of homes and their rents with little more than that, does not assist" in determining the appropriate amount of occupation rent (at para. 93(h)). So, what does assist, then?

In *K v. H*, the husband brought expert evidence regarding the fair market rent for the matrimonial home, off which he based the amount of his claim. Justice McGee does not appear to take issue with the adequacy of this evidence, but it is difficult to know for certain, since she decided in these particular circumstances there was no entitlement to occupation rent. It was not necessary for her to assess the adequacy of his evidence or the reasonableness of his calculation.

In another recent case, *Skrak v. Skrak* (2024 ONSC 1574), Justice Agarwal ruled that the party making the claim for occupation rent has the obligation to adduce the evidence to support the amount claimed. Justice Agarwal declined to take judicial notice of rental rates and specified that the husband should have provided opinion evidence on the rental rates in question (at para. 96).

Conclusion

The non-occupying spouses in *Mansfield* and *K v. H* were both unsuccessful in their claims for occupation rent. And so, while the case law appears to have dropped the "exceptionality" requirement for successful claims of occupation rent (if it ever existed), it appears that this may not make a practical difference for those making a claim. It is still the same set of factors being applied either way, with broad judicial discretion.

Occupation rent remains a discretionary equitable remedy, to be assessed in the larger context of the parties' circumstances, with regard to what is fair and equitable as between the parties.

A party has no guarantee of success on the basis of title and non-occupancy. Parties and their lawyers should be advised to come prepared with a holistic assessment of all of the payments being made in the context of the parties' separation, and with expert evidence to support the amount of rent that they are claiming.