Ontario Family Law Monthly

O.F.L.M. 2024-5

A monthly review and discussion of family law in Ontario

In the May 2024 issue:

Pg. 4

Words lawyers do not want to hear at an uncontested trial: "Why? On what evidence?"

L. v. L. **(2024 ONSC 1444) – Jarvis J.**

Christina Hinds

Pg. 9

Financial disclosure – seeking a balance between too much and too little

Frost v. Frost **(2024 ONSC 2594) – Jain J.**

Amruta Ponkshe

Pg. 17

Caught on camera: discouraging surreptitious recordings

Kralka v. Courtis **(2024 ONSC 1761) – Vella J.**

Samantha Rich

Pg. 23

Crafting persuasive parenting plans using the AFCC-O Guidelines

Harlow v. Gertel **(2024 ONSC 2310) – Kraft J.**

Jackson v. De Moura **(2024 ONSC 2463) – Chozik J.**

Gerling v. Gerling **(2024 ONSC 1034) – Vella J.**

Ainsley Doell

Pg. 35

Getting in, getting out: when is an order for supervised parenting time appropriate?

***Gerasimopoulos v. Sambirsky* (2024 ONSC 2368) – Kraft J.**

***Gill v. Gill* (2023 ONSC 5882) – Himel J.**

Lesley Singer

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

Copyright (c) 2023-2024 Frenkel Tobin Publishing. All rights reserved.

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").

Words lawyers do not want to hear at an uncontested trial: "Why? On what evidence?"

Christina Hinds

Overview

An uncontested trial is defined within the *Family Law Rules* as a trial at which only the party making the claim provides evidence and submissions.

L. v. L. (2024 ONSC 1444) is a recent decision of Justice Jarvis following an uncontested trial where he declined to grant the relief sought by the mother. *L. v L.* serves as a reminder that an uncontested trial, sometimes referred to as a chambers trial, still requires proper preparation and "trial worthy evidence".

In *L. v. L.*, the mother sought an order to set aside the parties' 2015 separation agreement. She also requested sole decision-making of the parties' child, child and spousal support, and equalization of the parties' net family properties.

The father's pleadings had been struck in January 2023 by Justice Bruhn, with respect to both parenting and financial issues and the uncontested trial was heard in February 2024. Justice Jarvis refused to grant the relief requested by the mother with respect to the financial issues on the basis that the mother did not provide sufficient evidence or legal basis for her claims.

Evidentiary requirements of an uncontested trial

The evidentiary requirements of an uncontested trial are no different from a trial held in open court. Justice Jarvis explained that in either situation, "trial-worthy evidence is required, in other words, admissible, probative evidence" (*L. v. L.,* at para. 4).

In *Cedeno v. Cedeno*, 2023 ONSC 6686, Justice Kristjanson noted that at an uncontested trial, it is not the judge's responsibility to cure deficiencies in the record.

While judges have discretion to require a party to produce additional evidence or provide oral evidence, parties should not rely on this discretion, and must prepare a full evidentiary record. Citing *Obhan v. Chana* (2021 ONSC 2877), Justice Kristjanson stated at paragraphs 3, 4 and 7:

> **Since this is a trial, I must apply the rules of evidence to documents and affidavit evidence relied on.** As Somji, J. held in *Obhan v. Chana*, 2021 ONSC 2877 at para. 5:
>
> > It is important to note that the mere fact that the Respondent has failed to file an Answer does not preclude the need to ensure that proper evidence is filed by the Applicant to enable a family court judge to make an order for the relief sought: *E.S.R. v. R.S.C.* (2019) ONCJ 381 at para. 208; *CAS v. J.U. and B.P.-M.*, 2020 ONSC 3753, 42 R.F.L. (8th) 373, at para. 10.
>
> The Applicant did not file a factum. This is a trial. As a trial judge I must make findings of fact based on evidence. I must apply statutory provisions. I must consider the case law. **An uncontested trial by Form 23C takes place in chambers. I was provided no assistance regarding how or why I should decide the case based on the affidavit evidence filed.** I have had to make my own determinations of law in the absence of any submissions by the Applicant...
>
> **An uncontested trial is not a rubber-stamp.** While judges have discretion to require a party to produce additional evidence, or to provide oral evidence, it is not the judge's responsibility to cure deficiencies in an applicant's record. Busy Family lists mean it is difficult for a judge to engage in multiple rounds of fact-finding through back and forth with counsel or a party. **An uncontested trial is a trial, set for a full hearing, and determination, on the date it is assigned to the judge.** (emphasis added)

While Justice Jarvis acknowledged that preparing an evidentiary record for an uncontested trial can be challenging – an uncontested trial should never be an invitation to engage in speculation or to invite the court to make an arbitrary order" (at para. 6).

The Separation Agreement

In *L. v. L.*, the mother asked to court to set aside the parties' 2015 separation agreement

because of a lack of financial disclosure from the father and her lack of independent legal advice. However, the mother did not provide any evidence of the circumstances which led to the separation agreement.

Justice Jarvis noted that while many of the terms of the agreement were likely unenforceable, improvident, or possibly unconscionable, the court should not be obliged to speculate as to whether the agreement, or parts of the agreement, should be set aside (at para. 8).

Equalization

The mother sought an equalization payment to her in the amount of $173,500. However:

(a) The mother did not submit a Net Family Property Statement along with her material. Rule 13(14) of the *Family Law Rules* requires a Net Family Property Statement to be filed where an equalization payment is claimed. As stated by Justice Jarvis, Rule 13(14) is not permissive (at para. 14).
(b) The mother did not file an updated financial statement or affidavit confirming no material change as required by Rules 13(12) and 13(12.1).
(c) The mother did not file a Certificate of Financial Disclosure as is mandated by the *Family Law Rules* (at para. 13). Where support and property claims are made, parties are required to serve a Certificate of Financial Disclosure pursuant to Rule 13(5.0.2).

Support

While there was some evidence of the father's income from the time in which he was involved in the proceeding, the mother did not submit any updated evidence with respect to the father's income. In 2018, the father earned around $210,000; in 2019,

the father earned $147,900; and in 2020, the father earned $39,100. The mother asked the court to impute income to the father in the amount of $200,000 retroactive to 2015. In response, Justice Jarvis asked the rhetorical question: "Why? On what evidence?" (at para. 16).

While the mother had evidence of the father's income between 2018 and 2019 and several bank account statements, Justice Jarvis did not consider such evidence sufficient to make an order for retroactive or ongoing support. The mother's material did not include any steps that she took to obtain evidence as to the father's income, including:

- a third-party disclosure motion to the father's employer or banking institutions;
- a corporate search on the paternal father's company/companies;
- evidence from the company's public filings;
- evidence from the company's social media posts or the father's social media posts;
- an inquiry pursuant to the *Personal Property Security Act*; and
- Any steps to hold the father in contempt for his non-disclosure?

Justice Javis noted that such evidence would have assisted the court in its fact-finding inquiry and that the evidence provided by the mother was insufficient to warrant the relief claimed (at para. 19).

In response to the mother's request for lump sum spousal support in the amount of $105,000, Justice Jarvis asked again: "why and on what basis?" (at para. 21).

Further, the mother asked for contribution toward the child's section 7 expenses but did not detail those expenses and proof of the expenses. She also did not provide evidence as to her own income.

Conclusion / To do list

When preparing uncontested trial materials, parties and lawyers would do well to keep in mind the following:

1. Compliance with the *Rules* is not relaxed when the matter proceeds by way of an uncontested trial – lawyers and parties must ensure financial statements are updated, and net family property statements and certificates of financial disclosure are filed, where applicable.

2. File a factum! Provide the court with the applicable statutory provisions and case law.

3. Do not expect the court to fill in any evidentiary gaps.

4. Do not rely on the court's discretion to ask for additional evidence. Prepare your client's materials as though the trial is proceeding in open court.

5. Do not rely on the lack of financial disclosure provided by the other party. If your client is unable to obtain the evidence, ensure that your client has taken further steps to try to obtain the relevant evidence.

If such preparation is not undertaken, parties may find themselves in a similar situation as the mother in *L. v. L.*

Financial disclosure – seeking a balance between too much and too little

Amruta Ponkshe

Overview

The general principles of financial disclosure are relevance and proportionality. In attempting to understand the foundation and the applicability of those principles, we are guided by the *Family Law Rules* and seminal cases that continue to be referenced in recent decisions.

This article reviews the above principles from their legislative sources as well as the case law that elucidate and apply them. Included in this review is the recent case of *Frost v. Frost* (2024 ONSC 2594), where Justice Jain agreed to order one party's disclosure requests, but not the other.

Basic Obligation of Financial Disclosure

In *Roberts v. Roberts* (2015 ONCA 450), the Court of Appeal made three important comments:

1) The most basic obligation in family law is the duty to disclose financial information.

2) This requirement is immediate and ongoing.

3) Financial disclosure is automatic. It should not require court orders to obtain production.

As discussed in *McDowell v. McDowell* (2021 ONSC 1954) at paragraph 40, Rule 13 requires each party to make full and frank disclosure of their financial situation, sufficient to allow a full understanding of their financial circumstances by way of a sworn financial statement. The information set out in a party's financial statement is a

baseline for that party's obligation to provide disclosure, and the information in the financial statement (or lack of it) will often be the driving force behind subsequent disclosure requests that engage the principle of proportionality.

Beyond statutory obligations of disclosure under Rule 13, Form 20: Requests for Information are an effective tool to seek production of documents from the other party. These further requests may be made under Rule 19(1) that allows one party to request a list of documentary disclosure from the other.

Similarly, under Rule 20(5), a court may make an order for disclosure if the following conditions are met:

(a) It would be unfair to the party who wants the questioning or disclosure to carry on the case without it;

(b) The information is not easily available by any other method; and

(c) The questioning or disclosure will not cause unacceptable delay or undue expense.

Under Rule 20(16), an order for questioning may also require the person to bring any document or thing that is relevant to any issue in the case and in the person's control or available to the person on request.

While responding to or requesting foundational disclosure required under Rule 13 is quite straightforward, it becomes difficult to analyze the relevance, proportionality and adequacy of further disclosure requests.

The Rules also impose sanctions for parties who fail, especially deliberately, to disclose required financial information and documents. Consequences of such failure include an order for costs, dismissing a claim, or striking pleadings. In the words of Justice Rogers in *Chernyakhovsky v. Chernyakhovsky* (2005 CanLII 6048), "the severity of the

sanctions serves to emphasize the importance of disclosing the necessary information in a file quickly".

When so much is at risk, it becomes pertinent for family lawyers to answer the litigants' common question – "how do we determine whether or not to produce the requested disclosure?"

The answer to this question is usually based on the facts and nuances of the particular case. For example, where a party is claiming spousal support, it may be proportionate to request the corporation's general ledger, receipts and statements of personal expenses run through the corporation, etc. to accurately determine their self-employment income. Or, where a party is unemployed and unable/unwilling to pay support, it may be appropriate to request them to share proof of the efforts they have made to seek new employment opportunities.

Another important factor that must be considered is costs related to producing disclosure. In determining the necessity of disclosure, lawyers must consider the probative value of the disclosure requested and compare it to resources (including legal fees) consumed in making it available.

Proportionality and Relevance

Referencing *Chernyakhovsky (above)*, the Ontario Court of Appeal in *Kovachis v. Kovachis* (2013 ONCA 663), stated:

> Although full and frank disclosure is a necessary component of family law litigation, exhaustive disclosure may not always be appropriate. **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.** Disclosure orders must be fair to both parties and appropriate to the case. (emphasis added)

It is widely accepted that the introduction of Rule 2 has reinforced the proportionality-and-relevance analysis to determine the adequacy of financial disclosure requests. As pointed out in *Kochar v. Kochar* (2015 ONSC 6650), the principle of proportionality is enshrined in the *Family Law Rules* by Rule 2.

Rule 2 establishes that the primary objective of the *Rules* is to enable the court to deal with cases justly. This encompasses ensuring fairness to all parties, saving time and expenses, ensuring matters are adjudicated in accordance with their complexity, and allowing judicial resources to be appropriately allocated.

In the recent case of *Recker-Perera v. Perera* (2024 ONSC 2452), at paragraph 18, Justice Bula reiterated the considerations summarized in *Tonogai v. Tonogai* (2016 ONSC 2366) with respect to proportionality of financial disclosure:

> In addition to relevance, in assessing requests for additional financial disclosure, the court must also consider the concept of proportionality. That is, **the burden of the disclosure request upon the disclosing party, including the time and expense involved in producing the information, must be assessed in context of the relevance and importance of the content.** This involves a balancing of fairness to the parties on the specific facts of each case… These considerations of fair process, expense and time, importance and complexity, and allocation of resources are all fundamental components of the court's obligation to promote the primary objective of the *Family Law Rules*, to deal with cases justly. (emphasis added)

While discussing the concept of relevance in financial disclosure, Justice Aston in *Kochar* stated at paragraph 4:

> …Merely proving the relevance of a document may be insufficient to warrant production. To order production the court must be satisfied that it would be "unfair" to the party seeking production to go on with the case without the document or information. In essence the document must be found to be important to a party's case, especially in relation to the amount at stake.

It is important to note that Rules 19 and 20 require the court to assess relevance and proportionality of one party's disclosure requests before requiring the other to produce the disclosure.

In *Korn v. Korn* (2017 ONSC 4934), when presented with both parties seeking orders for disclosure from the other, Justice Faeita discussed the application of these particular rules. His Honour reiterated that:

> The test under Rule 19(1) and Rule 20(16) is narrower than the "semblance of relevance" test traditionally applied given that the Rules require disclosure when the question or request for production is "relevant to any issue in the case" rather than the former, broader test of whether the question is one "relating to any matter in issue". The focus on "relevance" as opposed to the "semblance of relevance" is also consistent with the primary objective of the *Family Law Rules* described in Rules 2(2) and 2(3), particularly on promoting the saving of expense and time.

In *Boyd v. Fields* (2006 CarswellOnt 8675), Justice Perell made the often-quoted statement "the fundamental question is whether the various items of information are relevant or whether they have a semblance of relevance having regard to the material issues in this case" (see para. 11).

Justice Rogers provides a very helpful roadmap in *Chernyakhovsky* for the court and lawyers alike to assess the nature of disclosure requests.

- The analysis begins with the primary consideration of the burden certain disclosure requests bring for the disclosing party.
    - Is the probative value of the sought-after disclosure so great in relation to the difficulty of obtaining the disclosure that said disclosure would be ordered and sanctions imposed for failure to comply?

- The second consideration is relevance.
    - How does the disclosure request fit into the overall context of the case?
    - Is the issue for which disclosure is requested a central issue in the case? Or is it peripheral?
    - As the case develops, is the disclosure still related to an important issue in the case?

- The third is proportionality.
  - Does the cost of obtaining the disclosure outweigh the value of the issue in the case?
  - Is there a more expeditious and cheaper way of getting the same information?
  - As always, the court must balance these competing interests to ensure fairness.

Justice Rogers finally reminds us that the key factor is to "*balance these competing interests to ensure fairness*" (see para. 8).

***Frost v. Frost* (2024 ONSC 2594)**

In a recent case from May 2024, Justice Jain had to decide a motion brought by the husband, shortly before trial, seeking relief regarding the wife's alleged breaches of court orders and non-compliance with Rule 13.

The husband also required non-party disclosure from TD Waterhouse Canada Inc. to trace his claims for an exclusion under section 5(2) of the *Family Law Act*. TD advised that they no longer have the statements in their system as the records being requested were over seven years old. Justice Jain found this response reasonable. On further inquiry, TD advised that some limited records (screenshots) may be available.

Justice Jain held that the order sought regarding the non-party disclosure were relevant, reasonable and proportionate to the equalization issue. The husband had also fulfilled procedural requirements under Rule 19(11). Her Honour granted the order for the non-party disclosure.

With respect to disclosure sought from the wife, the husband's counsel prepared a 15-page chart entitled "Schedule A – Outstanding Disclosure Required from the Applicant" with an itemised list of each alleged outstanding item. She submitted that she was relying on the Form 8.0.1 Automatic Order and a previous order of Justice Krause, as well as rules 13 and 19 of the *Family Law Rules*.

During the course of the ongoing litigation, the wife had been served five Requests for Information. The wife's counsel submitted that in his experience, this appeared excessive.

The husband's counsel argued that the requests were relevant and that she did not want her client to be "ambushed" at trial. She also attacked the wife's credibility and tried to have the wife "admonished" by the court for not providing the disclosure requested by the Respondent. Justice Jain disagreed.

Her Honour took issue with the husband's requests for disclosure related to the wife's divorce from her former husband. When asked about the relevance of these requests, the husband's counsel advocated that the documents would speak to the validity of the parties' marriage and the property claims that followed. Justice Jain commented that raising the issue on the eve trial amounted to a "fishing expedition" and was "a complete waste of the parties' time and the court's resources".

The court concluded that the husband had been provided with "ample, relevant and proportionate disclosure". Her Honour concluded that the husband's additional requests for disclosure were "excessive, unnecessary, and/or irrelevant and/or disproportionate". The balance of the husband's motions was dismissed pursuant to Rule 2(2) to (5) of the *Family Law Rules*. Justice Jain also confirmed that the wife was the successful party and was presumed to be entitled to costs.

Conclusion

There are two extremes in the spectrum of financial disclosure. On one end, there is inadequate disclosure that may hinder a just and fair resolution of the issues between parties. The opposite end of the spectrum is excessive and unnecessary demands for disclosure. Such demands often increase costs and delay resolution.

As lawyers, our duty is to ensure that disclosure we advise our clients to provide as well as disclosure we request from the opposing party falls somewhere in between the two extremes.

In seeking this balance, we are guided by the principles of relevance and proportionality.

Caught on camera: discouraging surreptitious recordings

Samantha Rich

Overview

Justice Vella's costs endorsement in *Kralka v. Courtis* (2024 ONSC 1761), serves as a reminder of the court's disapproval regarding surreptitious recordings in family law proceedings. *Kralka* also warns us that the use of surreptitious recordings could have negative cost consequences. It is noteworthy that a significant factor in not awarding costs to either party was the fact that the parties surreptitiously recorded one another for the purposes of the motion.

Surreptitious video and audio-recording in the context of family law proceedings has unfortunately become a ubiquitous practice by litigants. The reality is that when parties record one another in a misguided attempt to obtain "evidence", all it achieves is adding fuel to the proverbial fire.

Still, the courts have admitted certain video and audio-recordings where the probative value outweighed the prejudicial effects and policy considerations against encouraging surreptitious recordings.

Background in Kralka v. Courtis

In *Kralka v. Courtis*, the Applicant father sought costs on a full indemnity basis in the amount of $15,671 arising from a parenting motion. The Respondent mother claimed costs on a partial indemnity basis in the amount of $13,715, claiming she achieved substantial success.

One of the preliminary issues was the admissibility of surreptitious recordings into evidence. The father sought to submit surreptitious recordings of the mother and the

mother sought to submit her own surreptitious recordings of the father into evidence - but only if the court ruled that the father's surreptitious recordings were admissible.

Justice Vella reviewed the offers to settle that were exchanged by the parties and found that neither party obtained a result that was as good as or better than the motion result. Importantly, Justice Vella held that a significant factor weighing into the costs analysis was the fact that the parties surreptitiously recorded each other for the purposes of the motion. Consequently, she did not award costs to either party.

Surreptitious recordings are strongly discouraged

While surreptitious recordings are sometimes admitted for their probative value, the general consensus according to the current jurisprudence is that surreptitious recordings are not encouraged in family law proceedings.

Justice Vella noted that the father's video was recorded for the purpose of portraying the mother in an unflattering light during the course of a particularly emotional argument in order to gain advantage in the litigation. It should be noted that the argument did not take place in front of the child. She held at paragraph 10 that:

> This practice is not in the best interests of their child because it fosters an environment of deceit, inability to trust, and constitutes a significant roadblock to having candid and productive discussions about parenting decisions in the best interests of the child…

As stated by Justice Pazaratz in his decision of *KM v. JR* (2022 ONSC 111), "From the court's perspective, surreptitious recordings in family law matters are strongly discouraged and are often not admitted into evidence. The court retains the discretion to determine whether the recording's probative value outweighs the strong policy factors that lean towards its exclusion." (at para. 198)

Therefore, there is a high threshold to be met in order to have a surreptitious recording admitted into evidence in family law proceedings. The content of the recording will be carefully scrutinized to determine whether its probative value warrants departing from

the policy considerations discouraging recording one's partner without their knowledge or consent.

The negative sentiment regarding recordings in family law has endured for at least two decades. Justice Pazaratz cited Justice Sherr's decision of *Hameed v. Hameed* (2006 ONCJ 274), sharing the view that surreptitious recordings by litigants in family law matters are strongly discouraged as they tend to heighten feelings of mistrust which are not conducive to rebuilding trust between families post separation:

> … Surreptitious recording of telephone calls by litigants in family law matters should be strongly discouraged. There is already enough conflict and mistrust in family law cases, without the parties' worrying about whether the other is secretly taping them. In a constructive family law case, the professionals and the courts work with the family to rebuild trust so that the parties can learn to act together in the best interests of the child. Condoning the secret taping of the other would be destructive to this process. (at para. 11)

The rule is not absolute

The courts have held that if the content of the recording is of sufficient probative value, and if the probative value outweighs the policy considerations against such recordings, then the court will admit the recordings into evidence.

Justice Vella acknowledged that there may be circumstances when a surreptitious recording may be ultimately justified. She stated that, "Such circumstances may be present when there is an act of intimate partner violence which often occurs behind closed doors and is witness-less." (*Kralka v. Courtis*, at para. 11)

Other examples of when a surreptitious recording may be admitted into evidence are where the misconduct is serious, and the probative value of the evidence directly raises credibility issues (*Pantin v. Pantin*, 2021 ONSC 6651, at paras. 16-19).

It is also more likely that a recording may be admitted into evidence if the recording does not involve the children (*Pantin v. Pantin*, 2021 ONSC 6651, at para. 20).

Justice Spence in the decision of *Scarlett v. Farell* (2014 ONCJ 517) summarized the case law in the area of surreptitious recordings in family law proceedings at paragraph 31:

> Although these cases may seem to take different approaches to the admissibility of surreptitious recordings of family conversations or events, in my view, all of the cases can be reconciled with one another. **All the cases recognize the general repugnance which the law holds toward these kinds of recordings**. However, at the end of the day, the court must consider what the recordings themselves disclose. And if the contents of those recordings are of sufficient probative value, **and if, as Justice Sherr stated, the probative value outweighs the policy considerations against such recordings, then the court will admit them into evidence**. It will do so having regard to the court's need to make decisions about the best interests of children based upon sufficiently probative evidence that may be available to the court. (emphasis added)

In order to rebut the presumption against admitting surreptitious recordings into evidence, the recording must be "central to the need to do justice". As summarized by justice Chozik in *Melek v. Mansour* (2022 ONSC 6688) at paragraph 116:

> In order for a surreptitious recording to be admitted, the probative value must outweigh the significant, presumptive prejudice caused by the surreptitious recording. As explained by Kurz J., the "presumption cannot be rebutted short of evidence disclosing serious misconduct by a parent, significant risk to a child's safety or security, or a threat to another interest central to the need to do justice between the parties and the children"…

Justice Finlayson in *SCH v. SR* (2023 ONSC 4928) noted at paragraph 605 of his decision that, "A recording will be probative if it is both reliable, and relevant to a particular substantive issue in the case, and sometimes, to credibility."

It is highly unlikely that surreptitious recordings will be admitted into evidence for the mere purpose of portraying one's partner in an unflattering light.

Policy considerations

Justice Kurz in his decision of *Van Ruyven v. Van Ruyven* (2021 ONSC 5963) held that the only way that judges can effectively discourage such conduct is to refrain from rewarding it, i.e. by not allowing surreptitious recordings to be admitted into evidence in family law proceedings. He stated at paragraphs 40 – 41 that:

> It is dangerous to the state of family law and more importantly, to the parties and children governed by it, to treat their dealings as if they were living under the Stasi in East Germany. **Not everything is public and not every utterance or gesture needs to be recorded.** To the contrary, routinely allowing our courts to reward a party's attempt to secretly spy on the other by admitting the fruits of that conduct into evidence contributes to the corrosiveness of matrimonial litigation. That approach must be discouraged. (emphasis added)
>
> …
>
> The only way that judges can effectively discourage such conduct is to refrain from rewarding it. To do that, **courts must presume that the prejudicial effect of those secret recordings far outweighs their probative value to our system of family law and the best interests of the children affected by it. That presumption cannot be rebutted short of evidence disclosing serious misconduct by a parent, significant risk to a child's safety or security, or a threat to another interest central to the need to do justice between the parties and children**. Short of such evidence, courts must say "hands (or phones) off" the recording feature of parents' smart phones when they seek to secretly record each other and their children. (emphasis added)

One of the issues when assessing the probative value of surreptitious recordings is the fact that we do not always have the context. Justice Fowler Byrne in *Pantin v. Pantin* (2021 ONSC 6651), stated at paragraph 14 of her decision that, "I agree with the preponderance of jurisprudence in this area, which is to reject such recordings as harmful and unreliable. They represent only one moment in time and are not necessarily characteristic of a person in their entirety."

Justice Kurtz also discussed the concerns relating to the rights of privacy, security, and free expression at paragraph 30 of his decision:

> We live in a world of such technological advance that every utterance and gesture is increasingly open to digital capture, whether at a street corner or in a private conversation in one's home. Privacy experts and advocates are increasingly concerned about the deleterious effects of the unrestrained monitoring of our utterances and behaviour. On the internet, it is said that anything captured can never be forgotten. Provincial and federal legislation has been passed to try to find a reasonable meeting point between the right to information and the rights of privacy, security and free expression. It would be fair to say that the present legislative balance is continually subject to review.

Arguably, one of the most important policy considerations is the fact that this type of behaviour is not child focused. As aptly stated by Justice Pazaratz, "Electronic recording of parenting exchanges is a growing trend which should be strongly discouraged. It puts the child in the middle. It exacerbates tensions and creates a heightened sense of potential or imminent conflict. It clearly demonstrates that the parent holding the camera is focussing more on the litigation than the emotional well-being of the child." (*KM v. JR*, 2022 ONSC 111, at para. 210)

Conclusion

One of the reasons cited by Justice Vella for not awarding costs was the fact that surreptitious recordings were taken and adduced for the purposes of the motion by both parties. This serves as a warning to family law litigants to be very careful about recording "evidence" for family law proceedings. Unless there are safety concerns or issues relating to credibility, a surreptitious recording will more likely harm than help your client's case. Counsel should caution their clients against surreptitiously recording their partners, as this will likely be met with disapproval by the court or worse yet, an adverse costs award. Before attempting to admit a surreptitious recording into evidence, it is prudent to carefully review the recording and your client's case holistically to determine whether the recording's probative value outweighs the strong policy factors that weigh against its admission into evidence.

Crafting persuasive parenting plans using the AFCC-O Guidelines

Ainsley Doell

Overview

It can be challenging to figure out how to craft a parenting plan that is in a child's best interests. The Association of Family and Conciliation Courts of Ontario's "*AFCC-Ontario Parenting Plan Guide*" is a useful tool for this purpose. This article briefly outlines what is found in this guide, as well as reviewing recent decisions from the Ontario Superior Court where judges used this resource to support the parenting orders that they made.

Introduction

As a family law lawyer, it is one thing to tell your clients to consider their child's best interests when crafting a parenting plan, and it is quite another to assist them in understand what exactly that means.

The Association of Family and Conciliation Courts of Ontario "*AFCC-Ontario Parenting Plan Guide*" ("the Guide"), published in January 2020, is a welcome but perhaps underutilized tool for this task.

For many parents who feel that they are better suited than their co-parents to meet their child's needs, the answer to this question may feel fairly simple: they should be their child's primary caregiver. But the fact of the matter is that responding to a child's best interests is often more nuanced.

Starting at the client level, the Guide is a useful tool for explaining how ideal parenting plans may shift with a child's developmental stage. Before a court, when used correctly, the Guide can provide helpful and persuasive support to convince a judge that your client's parenting plan is in their children's best interests.

Additionally, the task force who created the Guide is an impressive who's who in family law: Some notable individuals include Professor Nicholas Bala, Dr. Rachel Birnbaum, Dr. Shely Polak, Brian Burke and Jennifer Wilson.

This article will touch briefly on the different parenting plans that are recommended in the Guide for different developmental stages, but readers are best suited consulting it themselves.

The article will then move to a consideration of recent case law, observing five very recent cases where the Guide has been cited to support a parenting plan that was ordered, whether the litigants cited the Guide themselves or not. Interestingly enough, at least this year, there appears to be no reported cases in Ontario where judges have referred to the AFCC Guide but declined to follow its recommendations.

AFCC-O Parenting Guidelines

Justice Chappel has recognized the AFCC-O Parenting Guide as an "extremely helpful" tool, providing "valuable information and guidance to those involved in developing child-focussed parenting plans". She has also noted that the Guide was created "with extensive input from legal, mental health and social services professionals" (*McBennett v. Danis*, 2021 ONSC 3610 at para. 92).

The Guide was assembled as a response to a noted lack of parenting plan resources in Ontario, as well as an under appreciation of the importance of tailoring parenting plans to the differing needs of children at various developmental stages (see Nicholas Bala & Justice Andrea Himel, "Using the AFCC-O Parenting Plan Guide and Template: Resources for Ontario Family Lawyers and Their Clients", 2020 CanLIIDocs 3849).

The Guide is also accompanied by templates of possible parenting plans and verbiage that may be used.

a. Different parenting plans for different developmental stages

At each stage, the Guide provides schedule suggestions as well as general considerations that may inform the establishment of a parenting schedule. It is important that the below suggestions are not read in isolation from these considerations.

The appropriate parenting plan for a child also strongly depends on the child's history of care and the involvement of each parent.

As a child gets older, their input should also become more significant in crafting a parenting plan, in recognition of their growing maturity and also the importance of the routines and relationships that they are forming outside of the home.

i. Infants: Birth to 9 months (pgs. 13-15)

- Should not be away from either parent for more than a few days, to develop a healthy attachment to each;
- Overnight parenting with a non-residential parent "may be appropriate, preferably in surroundings familiar to the infant, if that parent has become an active involved caregiver"; and
- A communication log should be kept by the parents, to maintain routine and habits.

ii. Babies: 9 to 18 months (pgs. 15-16)

- Relevant factors:
    - Each parent's prior involvement in caretaking routines;
    - Each parent's ability to identify and respond to the baby's needs;
    - The baby's "emotional, social, physical, cognitive development"
    - The baby's temperament

- Suggested schedule is much the same as for infants, but it is recommended that the child sees each parent "every two to three days";
- A communication log is "essential" regarding developmental changes, milestones, and routines;

iii. Toddlers: 18 to 36 months (1 ½ years to 3 years) (pgs. 17-18)

- Parenting time can be **shared equally** (provided that both parents have shared the caretaking responsibility, the child has "an easy temperament", or the child has siblings on a shared parenting schedule;
- A **primary residence** may be more appropriate where there are communication issues between parents, the child has difficulty with transitions, etc.
  - In this case, frequent contact with other parent including overnight visits and contact during the week may be appropriate, such as "one or two 4 to 6 hour blocks and one or two non-consecutive nights"

iv. Preschoolers: 3 to 5 years (pgs. 18-19)

- The child should reside with a parent that has been primarily responsible for their care, with a graduated schedule to increase the "involvement and skills of the other parent";
  - E.g., 4 hours at a time, 2-3 times a week; graduating to one longer period of parenting that may include an overnight. Once comfortability of the child has been established, a 1-2 overnights a week may be introduced.
- Where both parents have been equally involved in the child's care, it is not recommended to have more than three nights away from either parent.

v. Early School Age Children: 6 to 9 years (pgs. 19-22)

- Where parenting has been shared more or less equally, a child may have 4-7 nights every two weeks with each parent. Examples of schedules may include:
  - 2-2-3-2-2-3;
  - 3-4-4-3.
- For some children, a schedule with a "home base" may be appropriate, where they reside with one parent during the week with mid-week visits with the other parent;
- Regardless of history of care, it is assumed that both parents should be significantly involved;
- Where one parent has had limited involvement, a graduated schedule could look like:
  1. One overnight each weekend, and an evening/dinner visit during the week; to
  2. Alternate weekends and a midweek visit.

vi. Later School Age Children: 10 to 12 years (pgs. 22-23)

- Frequent contact with both parents is recommended, but a broader range of plans may be appropriate;
  - For example, an alternate week or 5-5-2-2 arrangement;
- As with early school age children, a "home base" model may be preferred due to practical reasons, such as social relationships and school.

vii. Early Adolescents: 13 to 15 years (pgs. 23-24)

- The child's schedule and activities should be considered in crafting any parenting plan;
- Alternating weeks is suggested, however an expressed preference for a "home base" should be respected.

viii. Late Adolescents: 16 to 18 years (pgs. 24-25)

- Teenagers at this age should be afforded more input into the parenting plan, and parents ought to be flexible in accommodating the teenager's own schedule (work, school, social, etc.);
- A variety of plans may be appropriate, but teenagers in this age group may express preference for:
  - Alternating weeks;
  - Alternating two-week periods;
  - Maintaining a "home base" with an alternating weekend schedule.

b. What other factors influence choosing an appropriate parenting plan?

Along with providing templates for age-appropriate parenting plans and schedules, the Guide also addresses various other special considerations which may change what is "appropriate" for a child, such as:

- Parents who never lived together;
- Long-distance parenting;
- Children with special needs;
- Family violence;
- Immigration status and intersectional vulnerability;
- Parental substance abuse or mental illness; and
- Incarcerated parents.

The Guide also considers times when parenting plans should be reviewed or modified; communicating, planning, and implementing parenting plans; and addressing decision-making responsibilities.

Case Law

References to the Parenting Plan Guide by Ontario courts appear to be increasing and are made favourably.

Below are five decisions from the Ontario Superior Court that have been published in 2024 where the court refers to the Guide in supporting the parenting schedule which is ordered.

a. *Harlow v. Gertel* – Kraft J.

The Applicant father in *Harlow v. Gertel* (2024 ONSC 2310) was seeking primary residence and sole decision-making responsibility for the parties' two children, aged 15 months and 3 years,

The Respondent mother had unilaterally moved the children to other province, and Justice Kraft found that they were habitually resident in Ontario and must return.

However, the Applicant had not been involved in parenting the children: he was unaware of their routines or how to care for them (at para 26). The relief sought was not found to be appropriate.

Justice Kraft cited the Guide notes for infants from birth to 9 months old, as well as 9 to 18 months, which emphasize the importance of the non-primary parent developing parenting skills and involvement in caregiving before graduating to longer visits.

These excerpts also emphasized the importance of the primary caregiver taking a "long-term view" aimed at fostering a relationship between the child and the other parent and facilitating contact that allows them to become involved in and familiar with caretaking activities.

In this case, supervised parenting was found to be appropriate for the time being once the children were back in Ontario. The Respondent mother was also ordered to provide the Applicant father with information regarding the children's daily routines,

due to the importance of communication between parents and facilitating this relationship.

b. Jackson v. De Moura – Chozik J.

In Jackson v. De Moura (2024 ONSC 2463), Justice Chozik grappled with a situation where the parties' 12-year-old daughter expressed clear views with respect to parenting, but the status quo was a direct result of the Applicant's unilateral action in removing the children from the family home.

At the time of the motion, the Respondent father had an alternate weekend schedule with the parties' two children, aged 12.5 and 8. The Respondent was seeking equal parenting time for both children, while the Applicant was seeking a reduction of the alternate weekend schedule for the 12-year-old.

The Office of the Children's Lawyer had become involved, and reported that the 12-year-old consistently expressed that she wanted to spend less time with the Respondent. Conversely, the 8-year-old consistently expressed that he wanted to spend more time with the Respondent.

Despite this clear preference, Justice Chozik noted that the Respondent had unilaterally moved from the family home (months after separation) and taken the two children with her. This action abruptly changed the parenting status quo without warning. It was not clear whether the 12-year-old would still have the same strong views toward her father had the Applicant not taken this action.

In working through this problem, Justice Chozik refers to the Guide. The Guide refers to the fact that children in the 10-12 year range may feel the need to become "allied" with one parent and start resisting the other. In light of this, Justice Chozik crafts a parenting order aimed at rebuilding the relationship between the 12-year-old and her father.

The court held that the daughter would have at least one weeknight visit and alternating weekends with the Applicant. The son's alternating weekend schedule was slightly expanded, in recognition of his expressed preferences, and the daughter was given the option of also staying with her father on these additional nights.

c. *Tsiriotakis v. Rizzo* – Horkins J.

In granting the Applicant's request for an increased 2-2-3 parenting schedule, Justice Horkins notes the following:

> [108] There is no justifiable reason to deny the child's wishes. The child is entitled to have a significant and healthy relationship with both parents. Further, a 2-2-3 parenting plan is an appropriate plan for children aged 6-9 where parenting is shared (see the AFCC Parenting Plan Guide).
>
> [109] For most of this child's life, he has had less time with his father largely because the mother unilaterally moved the child to Windsor. A 2-2-3 parenting plan will allow the child to have his father involved in his weekly activities and give the child a real opportunity to strengthen his bond with his father in a meaningful way (*Tsiriotakis v. Rizzo*, 2024 ONSC 2339 at paras. 108-109).

The child had expressed their wish to spend equal time with each parent, despite the Respondent's continued interference by way of reports to Children's Aid societies.

Persuasive use of the Guide does not require lengthy engagement with it. In *Tsiriotakis*, Justice Horkins uses a swift reference to bolster her support of the parenting plan proposed by the Applicant.

d. *Gerasimopolous v. Sambirsky* – Kraft J.

In another recent decision from Justice Kraft, the Guide was aptly quoted to support a Respondent's unsupervised parenting time, which was challenged by the Applicant due to the Respondent's diagnosis of Bipolar 1 Affective Disorder (*Gerasimopolous v. Sambirsky*, 2024 ONSC 2368).

ftp

The Applicant was seeking supervised parenting time to guard against the alleged risks of a future manic episode. Justice Kraft found that this was not necessary, and in doing to, cited the section of the Guide which addressed the additional consideration of "Parental Substance Abuse or Mental Illness" (page 42 of the Guide).

The Guide indicated that in certain circumstances, depending on how substance abuse or mental illness is impacting a party's ability to parent, it "may be necessary to consider alternative parenting arrangements such as therapeutic intervention, supervised parenting time, or limiting parenting time until the concerns have been satisfactorily addressed".

Further, it may be necessary to put protocols in place "for ongoing or periodic monitoring and for a resumption or gradual increase in parenting time" (at para. 106; Guide, page 42).

However, where a parent acknowledges a diagnosis and follows a treatment plan, then their mental illness should not be an obstacle to parenting time. Justice Kraft cites *PP v. AV* (2021 ONSC 7459), in which Justice Himel also uses the Guide to support this proposition.

This is an example of the utility of the Guide beyond the scheduling suggestions that it contains, in figuring out how to respond to different considerations which may arise on the facts.

e. *Gerling v. Gerling* – Vella J.

In *Gerling v. Gerling* (2024 ONSC 1034), released in February 2024, both parties referred to different excerpts from the AFCC-O Guidelines in advocating for their proposed parenting plans.

The Applicant father sought equal parenting time on a 2-2-5-5- basis, and the Respondent mother sought a 6-8 schedule. The children were 9 and 6 years old.

The parties had differing narratives with respect to their involvement in parenting. Justice Vella found that the Respondent's evidence was more "harmonious" with the third party and documentary evidence regarding parenting.

Justice Vella noted that even with the Guide, there are no "hard and fast rules" but rather "general principles" (at para. 36).

In finding for the Respondent, Justice Vella stated that her parenting plan was consistent with the AFCC-O Guidelines, based on the findings of fact that were made.

Therefore, it appears that referring to the Guide is only one part of the battle: The other is ensuring that you have clearly set out your or your client's history of parenting, and referenced the appropriate section of the Guide.

Conclusion

The AFCC-O Parenting Plan Guide has immense utility to co-parents (whether or not they are in court), family law lawyers, and judges.

It can be used as a tool to explain and understand what kind of parenting plan may be appropriate for children in a variety of circumstances and developmental stages, or to support what is already a very well thought out parenting plan proposal.

The case law explored above provides examples of the ways in which Ontario Superior Court has recently used the Guide to support parenting orders.

The Guide can act as impartial evidence of what kind of parenting plans may be in a child's best interests, provided that the proposed parenting plan is based on facts that are accepted by the court.

For a further exploration of the Guide, please see Nicholas Bala & Justice Andrea Himel, "Using the AFCC-O Parenting Plan Guide and Template: Resources for Ontario Family Lawyers and Their Clients", 2020 CanLIIDocs 3849).

Getting in, getting out: when is an order for supervised parenting time appropriate?

Lesley Singer

Overview

Through a review of recent case law, this article identifies the factors courts consider when determining if supervised parenting time is necessary or if a different remedy (such as a no contact order) is more appropriate. This article further examines judicial approaches to transitioning into unsupervised parenting time and the importance of neutral, third-party evidence in making that determination. Past mental health concerns alone will not suffice to prolong an order for supervised parenting time, reflective of the court's evolving attitude towards reducing the stigma associated with mental health.

Introduction

A court may order supervised parenting time as a short-term solution to exceptional circumstances, notably where one parent's relationship with their children is fragmented or there are threats to the other parent's well-being.

Supervised parenting can take different forms. Typically, where safety concerns are not at issue or are less serious, family members or neutral non-related third parties may be ordered by a judge to supervise a party's parenting time. However, more formal and structured conditions are required in high-conflict cases, where it is appropriate for companies such as Brayden Supervision Services ("Brayden") to provide supervised parenting time. These may take place either at designated centres or at the parent's home (Bala et al., "Supervised Access as a Stepping Stone Rather than a Destination: A Qualitative Review of Ontario Services & Policies for Assisting Families Transitioning from Supervised Access", 2016 CanLIIDocs 4597).

ftp

It is well-established law that the test for appropriate parenting time arrangements, including whether to order supervised parenting time, is predicated on the child's best interests. Pursuant to s. 24(2) of the *Children's Law Reform Act* and s.16(2) of the *Divorce Act*, when making a parenting order, courts must give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

With this mandate, when making an order for supervised parenting time, courts look to various factors concerning the physical and mental safety, stability and wellbeing of the child (*Karimi v. Kyron,* 2024 ONSC 2043). If available, evidence from the Office of the Children's Lawyer or the parenting time supervisor's notes are generally probative when determining whether the supervision remains necessary.

Courts are alert to the artificial conditions under which supervised parenting typically occurs, and so, as will be explored in the case law below, the prevailing jurisprudence treats supervised parenting time as an exceptional remedy.

Getting in: Court Considerations for Supervised Parenting Time Orders

It is understood that the best interests of the child are, with few exceptions, realized through a stable and loving relationship with both parents (*A.(M.) v. D.(J.),* 2003 OJ No 2946). Further, as supervised parenting time is "a great intrusion into the relationship between a child and parent… its continued imposition must be justified" (*Young v. Hanson*, 2019 ONSC 1245, at para. 32).

A judge will only make an order for supervised parenting time when it is absolutely necessary and accordingly, the parent seeking an order for supervised parenting time bears the burden of establishing that necessity (*W.H.C. v. W.C.M.C.,* 2021 ONCJ 308; *Klymenko v. Klymenko,* 2020 ONSC 5451).

This begs the question: under what circumstances will a court find that supervision is necessary?

A helpful starting point is provided by Justice Pazaratz in *Izyuk v. Bilousov,* 2015 ONSC 3684. On a motion for security for costs, his honour states:

> Supervision may be an **intermediate** step in certain situations such as:
>
> a. Where there are substance abuse issues which need to be addressed.
> b. Where the child requires protection from physical, sexual or emotional abuse.
> c. Where there are clinical issues involving the access parent.
> d. Where the child is being introduced or reintroduced to a parent after a significant absence (at para. 53, emphasis added).

Izyuk was a high conflict case concerning an Applicant mother who was a serial litigator with multiple unpaid cost orders, including from trial, at which supervised parenting time was imposed. The rationale for ordering supervised parenting time in this case was that the mother was also a reckless alienator. She had lied routinely in her affidavits and to the OCL social worker, and her trial testimony was fraught with falsehoods. Further, she had made repeated attempts to isolate the father from the child's life.

On a previous emergency motion, Justice Pazaratz held that there was "good reason to fear the Applicant intended to abduct the child out of the country, as a result of her continuing preoccupation with gaining full control and excluding the Respondent from the child's life" (*Izyuk v. Bilousov,* at para 15). Given this, Justice Pazaratz made a temporary order for the mother to have fully supervised parenting time. This order continued at the trial as a final order.

This indicates that, in addition to the list enumerated by Justice Pazaratz, a flight risk and non-stop parental alienation are good reasons to order supervised parenting time.

Similar extreme circumstances will give rise to the level of necessity required to make an order for supervised parenting time. In a more recent case, *B. v. B.* (2023 ONSC 3336), Justice LeMay ordered that the Respondent father's parenting time be

supervised for two of the three children of the marriage (given the age of the eldest child, Justice LeMay was satisfied to leave it up to him to have contact with his father).

Drawing upon the factual underpinnings of an OCL report, Justice LeMay remarked that parenting time at a supervised access centre was necessary for a multitude of reasons, including:

- accusations and admissions of physical violence towards the children,
- repeatedly disparaging the Applicant in the children's presence, and
- involving the children in conflict between he and the Applicant.

The Respondent's parenting skills required "a complete reset" and supervised parenting time was the appropriate avenue to try and accomplish this (*B. v. B,* at para. 109).

Where supervised parenting time is not appropriate

a. Lack of necessity

Supervised parenting time is not appropriate in two scenarios. The first, of course, is when the concerns do not rise to the level of necessity. After all, supervised parenting time is conceived best as a "last resort where there is risk of harm to the children that cannot be addressed in any other satisfactory way." (*Kohli v. Thom*, 2021 ONSC 927 at paras. 29-31).

For example, in *Pereira v. Berezovsky* (2024 ONSC 1862), while the Applicant was regularly combative, abusive and uncooperative towards the respondent, Justice Kraft ordered that parenting exchanges taking place at the police station was in the best interests of the child as opposed to supervised parenting time.

b. <u>More serious intervention required</u>

Secondly, in the most serious of circumstances, a no contact order is the most appropriate remedy, rather than supervised parenting time.

The principles for determining when no contact order may be appropriate over supervised parenting time were articulated in *Armstrong v. Coupland* (2021 ONSC 8186) and subsequently cited with approval in *Gill v. Gill* (2023 ONSC 5882), including:

(a) Following a period of limited or no access (due to the parent's actions), where the parent provides no evidence that they can control their violent action, a termination of contact may be necessary. The potential for violence could lead to fearful consequences with respect to the child(ren) or the other parent.

(b) To deny access to a parent is a remedy of last resort.

…

(d) Terminating access may be required where there is a history of long term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and or fear.

(e) Ongoing severe denigration of the other parent may warrant no contact or supervised access.

…

(j) While supervised access is seldomly an indefinite or long-term solution, it should always be considered as an alternative to a complete termination of the parent/child relationship (at para. 125).

Getting Out: When Should a Supervised Parenting Order Be Lifted?

As put by Justice Abella: "Supervised [parenting time] is designed to provide a temporary and time-limited measure, to resolve a parental impasse over access, rather than provide a long [term] solution" (*M. (B.P.) v. M. (B.L.D.E.)*, (1992), 1992 CanLII 8642 (ONCA) at para. 80).

While supervised parenting is an effort to repair the parent-child relationship, in some circumstances it may hinder the very thing that it sets out to remedy. As an intrusive measure, supervision restricts the parent's ability to manage and organize his or her parenting time. Once again, it falls upon the party who wants supervised parenting time to show that it remains as necessary (*Karimi v. Kyron*).

In the context of the facts in *Karimi*, Justice Des Rosiers describes some factors for court consideration when determining whether supervision conditions should be modified or lifted that may be generalizable:

a. the child's right to have a meaningful relationship with both of her parents and a relationship with her grandparents,
b. safety concerns, both physical and health-related,
c. the capacity to the parents to co-operate and communicate about her needs,
d. the ability of the parents to place the child's needs ahead of their own needs…
e. their ability to adhere to rules established by the court (at para. 48).

In *Karimi*, the Applicant argued that the Respondent's anger and control issues, his irreverence for the judicial process and his child health concerns necessitated continued supervision, which Justice Des Rosiers agreed with.

a. ***Not solely for purposes of provi*****ding comfort custodial parent**

Supervised parenting time will not be extended if the sole purpose of doing so is to provide the custodial parent with a sense of comfort; rather, there "needs to be evidence of a serious concern" (*Karimi v. Kyron* at para. 49, citing *Lewis v. Lewis*, 2005 NSSC 256).

b. ***Importance of OCL reports and supervision notes***

When determining whether a supervised parenting order should be maintained, courts look primarily to third-party supervision notes, as well as OCL reports and CAS observations, if applicable. To transition out of supervised parenting time, the evidence should indicate that the parent has taken strides to repair the parent-child relationship and has shown improvements in doing so (*Karimi v. Kyron*).

Adding to this, lawyers should consider providing a roadmap for how and when supervision can be lifted. In *Karimi*, Justice Des Rosiers gave ample weight to an OCL report, which recommended that the Respondent's supervised parenting time continue, given the parents' poor communication skills and the child's young age. Disputing the OCL's findings, the Respondent failed to provide any sort of roadmap to prove his ability to parent the child without requiring supervision. In response, Justice Des Rosiers stated that a "roadmap toward [the] termination [of supervised parenting time] should be provided in light of the Court's concerns" (at para. 51).

Gerasimopoulos v. Sambirsky (2024 ONSC 2368) is a recent decision where Justice Kraft ordered that unsupervised parenting time was in the children's best interests. In the facts, the Respondent father had been diagnosed with Bipolar 1 Affective Disorder ("Bipolar") and, after having experienced a manic episode in front of the children, supervised parenting was initially ordered by Justice Diamond in 2020.

Through a series of events (and litigation), the Respondent continued to exercise his parenting time in a supervised manner. This includes a June 2023 incident where, during a manic episode, the police arrived at the scene and had to break the door down in front of the children. Despite this, the children maintained a comfortable, loving and caring relationship with their father, per the supervision notes from Brayden and CCAS observations. Further, since the June 2023 incident, the Respondent had been successfully managing his mental health.

A significant turning point in Justice Kraft's decision in *Gerasimopoulos* was the inclusion of a comprehensive safety plan drafted by the Respondent's treating psychiatrist. This safety plan accounted for the possibility of the children witnessing another manic episode, setting out how to mitigate any harms to them.

The Applicant did not accept the terms of the safety plan, nor unsupervised parenting time, because of her concerns of the future state of the Respondent's mental health. In response to these concerns, Justice Kraft makes a striking statement against the Applicant's position and against applying a broad-stroke approach to continue a supervised parenting time order at para. 2:

> I do not agree with [the Applicant] that the children require such significant protection to the point of full supervision whenever they are in the presence of their father because he may have a potential future manic episode… To make an order for supervised only parenting time for [the Respondent] as suggested by [the Applicant] would mean that this Court is being swayed by a stereotype that a parent with an episodic mental health condition is unfit to parent a child on his or her own…

Once again, supervised parenting orders cannot be a mere band-aid to the other parent's concerns. Where mental health concerns have already necessitated a supervised parenting order, courts should take a sensitive approach giving "mental health the attention it deserves" to reduce the "stigma associated with Bipolar" (*Gerasimopoulos,* at para. 107).

Conclusion

Supervised parenting time is an exceptional and temporary remedy that courts will only make an order for when it is necessary to repair the parent-child relationship or evaluate risks that may be present.

It continues to be ill-suited for prolonged periods of time, and in the most extreme of circumstances, a no contact order is the more appropriate measure that courts will order.

Providing the courts – and the opposing party – with a detailed, professionally-drafted safety plan or roadmap may be an effective strategy for transitioning out of supervised parenting time.

Finally, when relevant to the considerations of ordering supervision, courts should take a sensitive, de-stigmatizing approach to mental health diagnoses.