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

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

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Communication is key: Justice Chappel's decisions on decision-making

Amruta Ponkshe

Overview

It is often difficult for lawyers to advise clients with sufficient confidence whether it is in the children's best interests for parents to exercise sole or joint decision-making responsibilities.

The reason is that considering the legal principles and applying them with insufficient information results in genuine uncertainty.

Nevertheless, knowing what those legal principles that need to be considered are, is a crucial first step.

Those principles allow lawyers to explain the legal framework to clients at initial consultations adequately, and then should a motion or trial be necessary, to delve into the facts of the case and to manage client expectations relating to the outcome of a motion or trial.

This article highlights the important decision-making legal principles in the latest case of Justice Chappel, namely, *S.V.G. v. V.G.* (2023 ONSC 3206). And, after analyzing those principles, three recent decisions of Justices Agarwal, Sharma and Kraft are reviewed to understand how they applied those same principles.

Introduction

Section 16(1) of the *Divorce Act* confirms that the court should only consider the best interests of a child in making parenting orders. As Justice Lafrenière stated in *J.B.H. v. T.L.G.* (2014 ONSC 3569) at paragraph 354, the ultimate goal in crafting an appropriate decision-making regime is to promote the child's "right to grow up within

a parenting regime that is cooperative and effective, where decisions are made in a child-focused way and with the least amount of acrimony and stress."

There is consensus among judges that to make an order for joint decision-making responsibility, there must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. This principle was emphasized by the Ontario Court of Appeal in *Kaplanis v. Kaplanis* (2005 CanLII 1625 (ONCA)).

Section 16(3) of the *Divorce Act* also lists the ability and willingness of the parties to communicate and cooperate with one another on matters affecting the child as one of the factors the court should consider in determining the best interest of the child.

Case law is replete with discussions on the interplay between effective communication and decision-making responsibility. But it is Justice Chappel's comprehensive summary in *S.V.G. v. V.G.* (and her earlier decisions) of the relevant legal principles on this topic that has become a one-stop solution for other judges and family lawyers alike.

Discussion in *S.V.G. v. V.G.* (2023 ONSC 3206)

Before we jump into Justice Chappel's latest decision, we first need to mention *Jackson v. Jackson* (2017 ONSC 1566) and *Roloson v. Clyde* (2017 ONSC 3642). At paragraphs 65 and 59 of those cases (respectively), Justice Chappel summarized a number of general principles for the court to consider in determining whether it is in the best interests of a child to order joint decision-making responsibility.

Later in *McBennett v. Danis*, (2021 ONSC 3610), at paragraph 97, Justice Chappel added to her previous discussion in *Jackson* and *Roloson*, and listed fifteen principles discussing joint decision-making responsibility.

Most recently in *S.V.G. v. V.G.* (2023 ONSC 3206), at paragraph 111, her Honour reviewed more recent case law and put forth twenty relevant principles, as follows:

1. **There is no presumption in favour of granting joint decision-making responsibility** to both parties in some or all areas.
2. Joint decision-making in some or all areas should only be considered as **an option if the court is satisfied as a threshold matter that both parties are fit parents and able to meet the general needs of the children**.
3. In order to grant joint decision-making in some or all areas, **there must be some evidence before the court that despite their differences, the parties are able to communicate effectively** in the areas under consideration for the sake of the child. Where there is a history of significant conflict that has impacted the functioning and parenting of the parties and the wellbeing of the child, these factors will support an order for sole decision-making responsibility. The rationale for this principle is that the best interests of the child will not be advanced if the parties are unable to make important decisions regarding the child under a joint decision-making arrangement.
4. **The fact that there is some evidence of communication and cooperation does not, however, dictate in and of itself that joint decision-making must be ordered.** The trial judge must carefully assess in each case whether the parties' ability to cooperate and communicate about issues relating to the child is sufficiently functional to support an order for joint decision-making.
5. **The court is not required to apply a standard of perfection** in assessing the parties' ability to cooperate and communicate with each other on matters relating to the children. As Quinn J. remarked in the often-quoted case of *Brook v. Brook*, 2006 CarswellOnt 2514 (S.C.J.), "the cooperation needed is workable, not blissful; adequate, not perfect." The existence of occasional conflict does not necessarily preclude an order that involves elements of joint decision-making, and the court should consider the entire record of the parties' communication to obtain a clear sense of the nature and extent of the discord.
6. **The fact that one party insists that the parties are unable to communicate with each other is not in and of itself sufficient** to rule out the possibility of a joint decision-making order in some or all areas. The court must carefully consider the parties' past and current parenting relationship and reach its own conclusions respecting the parties' ability to communicate, rather than simply relying on allegations of conflict by one or both of the parties. The question to be determined is whether the nature, extent and frequency of the conflict between the parties is such that requiring them to decide issues jointly is likely to impact negatively on the well-being of the children.

7. **If the evidence indicates that the parties, despite their conflict with each other, have been able to shelter the child from the turmoil reasonably well and make decisions in the child's best interests when necessary, an order involving joint decision-making may be appropriate**. The issue for the court's determination is "whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis".
8. In addition, **where there has been some conflict in reaching decisions, the court should consider whether the differences in perspectives and the sharing of information supporting those perspectives have ultimately resulted in more positive outcomes for the child**. Evidence of challenges in working through parenting issues that result in better results for the child may support joint rather than sole decision-making.
9. In analyzing the ability of the parties to communicate, the court must delve below the surface and consider the source of the conflict. The Ontario Court of Appeal has clearly stated that **one parent cannot create conflict and problems with the other parent by engaging in unreasonable conduct**, **impeding access, marginalizing the other parent,** or by any other means and **then justify a claim for sole decision-making in their favour on the basis of lack of cooperation and communication**. Where the parties are both competent and loving parents, but one of them is the major source of the conflict, this factor may support an order for sole decision-making in favour of the other party. Alternatively, judges have often opted for orders for joint decision-making rather than sole decision-making with one parent in these circumstances, where they have been satisfied that the best interests of the child require a balance of influence and authority between the parties in addressing important parenting decisions.
10. However, **where an objective review of the historical and more recent evidence clearly indicates that there has never been an ability to cooperate or communicate effectively, and that both parties are responsible for this dynamic**, joint decision-making is not an appropriate order. This principle applies even where both parties are attentive and loving parents. In these circumstances, **hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis** for making an order that includes elements of joint decision-making responsibility. There must be a clear evidentiary basis for believing that joint decision-making would be feasible.

11. **The quality of each party's past parenting and decision-making, both during the parties' relationship and post-separation, is a critical factor** in determining whether an order for joint decision-making in some or all areas is appropriate.
12. However, **the mere fact that both parents acknowledge that the other is a "fit" parent does not mean that it is in the best interests of the child for a joint decision-making order to issue**. The determination of the appropriate decision-making arrangement must take into consideration all factors relevant to the child's best interests.
13. A party's **failure to financially support their children in a responsible manner may militate against an order for joint decision-making responsibility**, as this reflects poor judgment and an inability to prioritize the child's interests and needs.
14. In some cases, the parties are clearly able to cooperate and jointly support the best interests of the child in some areas of decision-making but have a pattern of conflict and lack of collaboration in other specified areas. In these circumstances, **a hybrid type of decision-making structure that provides for joint decision-making in the areas that have never been problematic but that allocates the remaining areas out to each party for sole decision-making** may be the most appropriate outcome.
15. In situations involving children with special needs, the extent of the parties' involvement in addressing those needs and **their willingness to consider reasonable recommendations from knowledgeable and experienced professionals involved with the child in addressing those needs** are important considerations.
16. In addition, in situations where there is conflict regarding a course of treatment or therapy for a child, **evidence that a parent has drawn the child into the conflict by attempting to make them an ally in their position on the issue may support an order for decision-making in favour of the other party**.
17. Another important consideration in situations involving children with special needs is the need for timeliness in decision-making. If the evidence indicates that efforts to reach parenting decisions has led to inappropriate delays in addressing the child's needs, with no positive outcomes for the child, this may support an order for sole rather than joint decision-making.
18. **In cases involving very young children, the court must take into consideration the fact that the child is unable to easily communicate** their physical, emotional, developmental and other needs. Accordingly, the need for

effective communication between the parties in a joint decision-making arrangement will be particularly pressing in such circumstances.

19. **The wishes of the child will also be relevant to the determination of the appropriate decision-making disposition in cases involving older children.** Although a child's wishes in such circumstances may not necessarily synchronize perfectly with the child's best interests, "the older the child, the more an order as to custody requires the co-operation of the child and consideration of the child's wishes".
20. **Evidence as to how an interim parenting order has worked**, and in particular, whether the parties have been able to set aside their personal differences and work together in the best interests of the child, **will be highly relevant to the ultimate decision regarding the appropriate decision-making regime.** (emphasis added) (citations omitted)

In addition to this summary, and after discussing section 16.3 of the *Divorce Act*, Justice Chappel also listed the various options available to the court in crafting tailor-made decision-making frameworks to suit unique facts of each case, at paragraph 107. The options available to the court are as follows:

1. It may grant sole decision-making responsibility in all areas to one spouse.
2. It may grant joint decision-making responsibility in all areas to both spouses.
3. It may grant joint decision-making responsibility to both spouses in one or more areas of responsibility, but give sole decision-making authority in the other areas to one spouse or allocate those other areas of decision-making between the spouses.
4. Alternatively, it may allocate each party sole decision-making responsibility in separate specified areas, with no provision for joint decision-making in any areas.
5. Another option open to the court is to require the parties to engage in all reasonable efforts and take all reasonable steps to make some or all significant decisions jointly, but to designate which party has final say in each area of decision-making in the event of disagreement. This option typically includes a detailed decision-making framework that establishes timelines for parties to

> exchange their positions and information on issues and requires them to take particular steps in an attempt to decide matters jointly.

Application to Unique Facts of Each Case

Since Justice Chappel first produced a summary of the legal principles discussing the interplay between effective communication and decision-making in *Jackson*, other judges in Canada have made favourable references to and reproduced Justice Chappel's summaries (including the one summarized above from *S.V.G. v. V.G.*) on this topic.

Below are three decisions from the Ontario Superior Court of Justice released in 2023 or 2024 where the court applies principles from Justice Chappel's summary in making an order for decision-making responsibility.

a. ***Albaz v. Rihawi*** **– Agarwal J.**

The Applicant mother in *Albaz v. Rihawi* (2024 ONSC 812) was seeking sole decision-making responsibility for the parties' four children, between the ages of 8 and 16 years. She proposed to consult with the Respondent father but retain the right to make the final decision. The Respondent father sought sole decision-making responsibility for the younger two children.

Justice Agarwal referred to Justice Chappel's decision in *McBennett* and reiterated that the best interests of the child cannot be advanced if the parties cannot make important decisions about the child under a joint decision-making arrangement. His Honour also discussed that in analyzing the ability of the parties to communicate, the court must delve below the surface and consider the source of the conflict.

In this case, there was a total breakdown in communication between the parties. Justice Agarwal noted that the parties' written communication bristled with passive-

aggressive comments and tone. If the parties communicated in person, it inevitably led to police or CAS intervention.

His Honour concluded that the utter lack of cooperation and communication between the parties militated against any for of joint decision-making. The Applicant mother was ordered to have sole decision-making responsibility for all four children.

It is peculiar to note that neither party asked for joint-decision-making, implicitly acknowledging their inability to effectively communicate with the other.

b. *Kumerdjieva v. Cerasuolo* - Sharma J.

The Applicant Mother in *Kumerdjieva v. Cerasuolo* (2024 ONSC 3029) brought a motion to change the final order of Justice Shore from 2021. She sought final decision-making responsibility for the parties' 11-year-old daughter. The Applicant Mother took the position that joint decision-making, with the assistance of a parenting co-ordinator, was not working for the parties.

Once his Honor had determined that a material change in circumstances had been established, the next step was for the court to embark on a fresh inquiry into the best interest of the child. Justice Sharma relied on *Roloson* stating that "there is no legal presumption in favour of the custodial parent, or in favour of maintaining the existing timesharing arrangements".

Justice Sharma noted that the Respondent Father had breached communication orders and deadlines which had impacted the Applicant Mother's ability to schedule events for the child. There was also evidence of the Respondent Father not responding to requests for a travel consent letter in a timely manner on numerous occasions. His Honour also found that the Respondent Father engaged in abusive communication with the Applicant Mother. His Honour concluded that "respect is a minimum requirement for a successful co-parenting arrangement" and the

Respondent Father had not demonstrated that. The Respondent Father had also frustrated the parenting co-ordinator process, leading to the resignation of the parenting co-ordinator.

Justice Sharma noted that, on the other hand, though the Mother lacked capacity to effectively co-parent with the Father, she had changed her approach over time. Her communication was consistently polite, timely, respectful and co-operative when dealing with the Father. When necessary, she obtained the advice and opinions of third parties (e.g., the parenting co-ordinator, the child's physician or therapist), shared them with the Father, and she proposed child-focused solutions. Justice Sharma concluded that "(t)hese are hallmarks of a co-parent seeking to co-parent effectively and in the best interests of a child."

The Mother was awarded sole decision-making responsibility with a positive onus on her to consult with the Father and consider his views prior to making major decisions for the child. Justice Sharma also ordered that communication between the parties would take place only through email correspondence, to document the process and to minimize the possibility of the child's exposure to parental tension and conflict. His Honour also set down a 48-hour deadline for one party to respond to the other's correspondence about major decisions, failing which consultation between the parties would be deemed to have occurred.

c. *Predotka v. Dudek* - Kraft J.

In *Predotka v. Dudek* (2023 ONSC 7025), Justice Kraft was presented with a case that began in a very unfortunate way, causing the trust between the parties to be significantly eroded. Just after separation in 2016, the Respondent Mother removed the child from daycare without notice to or obtaining the Applicant Father's consent and travelled with the child to Winnipeg. This, and the Mother's mental health difficulties, caused the parties' co-parenting relationship to be defined by mistrust.

The parties reached an interim agreement at a case conference for the Respondent Father to have sole decision-making responsibility for the child.

At trial, the Applicant Father maintained that it was in the child's best interests for him to continue to have sole decision-making responsibility over the major decisions that impacted the child. The Father submitted that he had made decisions for the child since she was a year old, and that the child had thrived in his care. He also submitted that he had demonstrated a willingness to keep the Respondent Mother informed about the child.

The Respondent Mother maintained that she had worked on her mental health issues, including taking an anger management course and a parenting course. She also submitted that while the Father was capable of making important decisions for the child, he did not involve the Mother in these decisions or consult with her before making decisions for the child. She was afraid that the Father had minimized her parental involvement and demonstrated the lack of value he placed on the child's relationship with her mother.

In analyzing the parties' ability and willingness to communicate with each other, Justice Kraft relied on the OCL lawyer's assessment report. Her Honour concluded that the court had little faith that either parent would be able to cooperate and communicate with the other effectively to co-parent the child.

Justice Kraft reproduced the relevant principles from Justice Chappel's summary in *S.V.G.* and reiterated the five options available to the court in terms of an order for decision-making.

Her Honour considered the advantages of a joint decision-making framework but held, at paragraph 26, that "joint decision-making is not a panacea".

Ultimately, Justice Kraft was not persuaded that the Father would start to consult with the Mother if he continued to have sole decision-making responsibility. It was important that both parents be involved in the important decisions that impact the child, particularly, since the Mother felt marginalized by the Father and the evidence was clear that the Father did not value the child's relationship with her mother. In these circumstances, Justice Kraft am persuaded that one party or the other must be given decision-making authority over each of the matters that impacted the child.

Her Honour decided that it was in the child's best interests that the parties made all reasonable efforts and took all reasonable steps to attempt to reach decisions relating to the child jointly. A detailed framework for the parties' decision-making was structured. If the parties were unable to reach a consensus after following the framework, they were to engage in mediation or parenting coordination to resolve the issue. If, even after mediation or parenting coordination, the parties were unable to reach an agreement, it was in the child's best interests that the Mother ultimately had final say on health matters and the Father had the final say on education and extra-curricular matters. This ensured that further court intervention was not required.

Conclusion

When attempting to advise on the best decision-making regime for a client, it is important to be up to date with the latest legal principles. *Kaplanis* was released in 2005, and the law has evolved significantly since then.

Fortunately, Justice Chappel has continued to provide excellent summaries of the latest decisions on the topic. And her latest case of *S.V.G. v. V.G.* is no exception. It is an excellent resource on the discussion on the interplay between effective communication and decision-making.

Lawyers should therefore use the above principles as a guide at various stages of their client's case.

And since there are significant repercussions in not interacting effectively with a former spouse, lawyers should also advise clients of the do’s and don’ts of positive communication that the above-mentioned cases clearly show.

Contempt and Consequences: When a court order is breached, is a contempt remedy the best option?

Samantha Rich

Overview

Picture this. You have successfully obtained a court order in your client's favour, your client is thrilled, and you have moved the matter forward in a positive direction. Then, your client informs you that the opposing party is not complying with the terms of the court order.

What do you do?

Well, you have two options – a contempt motion pursuant to Rule 31 of the *Family Law Rules* or enforcement pursuant to Rule 1(8).

Justice Pazaratz's recent decision of *K.M. v. J.R.* (2024 ONSC 1338) canvasses the enforcement remedy pursuant to Rule 1(8), which gives the court wide discretion in responding to non-compliance with a court order. Additionally, Justice Chozik's recent decision of *Barbara v. Cordeiro* (2024 ONSC 2951) canvasses the more discrete remedy of the contempt motion.

The two enforcement options differ significantly in terms of application, requirements, and onus of proof, while sharing the common purpose of being remedial rather than punitive.

This articles reviews both remedial options and discusses the legal tests for both.

Available remedies for breach of a court order

When a party breaches a court order, two independent enforcement options may be available to the aggrieved party:

1. A contempt motion pursuant to Rule 31; or

2. Enforcement pursuant to Rule 1(8) (*K.M. v. J.R.*, 2024 ONSC 1338, at para. 22).

These two enforcement options each have distinct requirements and burdens of proof to meet.

1. Contempt Motion – Rule 31

Remedy of last resort

Rule 31 of the *Family Law Rules* governs contempt motions based on a party's alleged failure to comply with a court order.

The Court of Appeal in Ontario in *Ruffolo v. David* (2019 ONCA 385) has held that the civil contempt remedy is a remedy of last resort in family law litigation. Similarly, Justice Chozik stated at paragraph 4 of her decision in *Barbara* that:

> A contempt order should not be granted where other adequate remedies are available to the aggrieved party, such as a variation of an order or enforcement of one. Great caution should be exercised when considering contempt motions in family law cases. Contempt findings should be made sparingly and only where conferences to resolve problems or motions for enforcement have failed …

The contempt power is used with restraint and only in exceptional circumstances, "where it appears to be the only reasonable means to send a message to the litigant that court orders are not to be flaunted" (*Barbara,* at para. 5).

General principles of the contempt remedy

Justice Chozik also cited at paragraph 8 the Ontario Court of Appeal decision of *Moncur v. Plante* (2021 ONCA 462), which set out the general principles governing the use of the contempt remedy:

> The following general principles govern the use of the court's power to find a party in civil contempt of court for breaching a court order:
>
> > 1. For a party to be found in contempt of court for breaching a court order, three elements must be proved beyond a reasonable doubt: (1) **the order alleged to have been breached must state clearly and unequivocally what should and should not be done**; (2) **the party alleged to have breached the order must have had actual knowledge of it**; and (3) **the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels**…
> >
> > 2. Exercising the contempt power is discretionary. Courts discourage the routine use of this power to obtain compliance with court orders. The power **should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort**. A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance…
> >
> > 3. When the issue raised on the contempt motion concerns access to children, the paramount consideration is the best interests of the children…(emphasis added)

The purpose of the contempt remedy is primarily remedial and aimed at encouraging compliance with court orders (*Barbara*, at para. 9).

While the contempt remedy has teeth, its purpose in family law proceedings is not punitive. As affirmed by Justice Pazaratz, "The purpose of contempt in most access cases is to fix the problem rather than punish the parent." (*Lippert v. Rodney*, 2019 ONSC 3154, at para. 9).

Use of the contempt remedy in family law proceedings

At paragraph 10 of *Barbara v. Cordeiro,* Justice Chozik cited Justice Chappel's decision of *Jackson v. Jackson* (2016 ONSC 3466) which summarized the use of the contempt remedy in family law proceedings:

a) it ultimately remains a matter for the Court's discretion;
b) because of its seriousness and quasi-criminal nature, it must be used cautiously and with great restraint;
c) it cannot be reduced merely to a mechanism for enforcing judgments;
d) it should be used sparingly and as a measure of last resort where there are no other adequate remedies available;
e) it is **typically reserved for cases involving defiant conduct that is at the most significant end of the spectrum** and where it appears to be the only reasonable means of sending a message to a litigant that court orders cannot be flaunted;
f) the **complex emotional dynamics involved in family law disputes and the desirability of avoiding further escalation of the conflict between the parties are additional factors that prompt a cautious approach**. (emphasis added)

As the contempt remedy is a quasi-criminal remedy, the court will exercise this power cautiously when wielding this sword of justice as the escalation of conflict should be avoided in family law proceedings. The breaching party's behaviour will have to be serious and at the end of the spectrum of defiant behaviour in order to meet the high threshold required for this enforcement option.

Proof beyond a reasonable doubt

Furthermore, the onus is on the person alleging contempt to prove it beyond a reasonable doubt. It should be noted that hearsay evidence is not admissible, unless it is not disputed (*Barbara*, at para. 11).

Justice Chozik summarized the nature of the onus of proof at paragraph 13 of her decision:

> Having regard for the quasi-criminal nature of contempt, the alleged contemnor must be afforded the same protection and procedural safeguards as an accused in a criminal proceeding. This includes the right to a hearing, the right not be compellable as a witness at the hearing, and the right to make full answer and defence, including the right to counsel, to call evidence and to cross examine upon the other party's evidence …

This is a high burden of proof for a litigant to meet. Counsel must ensure that their clients have sufficient evidence before pursuing this remedy as they will need to present a compelling case in order for this exceptional remedy to be granted.

Legal Test

Justice Chozik endorsed the test set out in Justice McGee's decision of *Haywood v. Haywood* (2010 ONSC 5615), which held that the court must make the following findings:

1. That the relevant order was clear and unambiguous;
2. The fact of the order's existence was within the knowledge of the respondent (on the Motion) at the time of the alleged breach;
3. That the respondent intentionally did, or failed to do, anything that was in contravention of the order;
4. That the respondent was given proper notice of the terms of the order.

Justice Chozik noted that despite the aforementioned legal test, "A judge retains an overriding discretion to decline to make a contempt finding even where the foregoing factors are met where it would be unjust to do so, such as where the alleged contemnor has acted in good faith to take reasonable steps to comply with the relevant court order." (*Barbara*, at para. 15)

She held that, "The order alleged to have been breached must be expressed in clear, certain and unambiguous language. The person affected by the order should know with complete precision what he or she is required to do or to abstain from doing. Implied terms cannot be read into the order. If the order alleged to be breached is ambiguous, the alleged contemnor is entitled to the most favorable construction…".

Rule 31 does not prescribe a particular format, however, contempt proceedings are generally bifurcated with the first phase addressing liability for contempt, and if liability is established, the second phase addresses the appropriate penalty.

If a finding of contempt is made, the breaching party is given the opportunity to purge the contempt, i.e. have it removed from their record if they comply with the court order. The matter is usually adjourned for a second hearing to address sentencing or other appropriate remedies. The breaching party's efforts to purge contempt is a mitigating factor which the court will consider when imposing a remedy (*Barbara*, at paras. 16 – 18).

Finally, in *Barbara v. Cordeiro*, the court dismissed the father's motion for contempt, noting that the motion should not have been brought in the first place. Since the father took no other steps to try to enforce the order, he proceeded against very clear principles that the contempt remedy is a last resort, not a first step (at para. 26).

2. Enforcement pursuant to Rule 1(8)

Wide discretion

In light of the hesitancy of the courts to use the contempt motion option, counsel are encouraged to consider an alternate way of achieving similar results.

Pursuant to Rule 1(8) of the *Family Law Rules*, the court has wide discretion in dealing with a party's failure to comply with a court order (*K.M. v. J.R.*, 2024 ONSC 1338, at para. 23). Rule 1(8) states:

> If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, including,
>
> (a) an order for costs;
>
> (b) an order dismissing a claim;

> (c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;
>
> (d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;
>
> (e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;
>
> (f) an order postponing the trial or any other step in the case; and
>
> (g) on motion, a contempt order. O. Reg. 322/13, s. 1.

The court has numerous enforcement options to exercise and has wide discretion to tailor a remedy which is most suitable to the specific set of circumstances giving rise to the non-compliance with the court order.

General principles of Rule 1(8)

Justice Pazaratz in his decision of *K.M. v. J.R.*, affirmed the broad and purposeful application of Rule 1(8). Ultimately, the court has authority to make any order which it considers necessary for the "just determination of the matter". He summarizes the purpose of Rule 1(8) at paragraphs 25 to 27 of his decision:

> The relief set out in Rule 1(8) **can be procedural and substantive**. The itemized list is inclusive, not exclusive.
>
> …
>
> The **broad and purposeful application of Rule 1(8) allows court to deal with a failure to obey by making any order that it considers necessary for a just determination of the matter**. Once the court is satisfied that a party is in non-compliance with a court order, the court can fashion a substantive remedy providing it is tied to the breached order such that the remedy will encourage compliance with the breached order. The scope of the court's discretion to fashion a responsive substantive remedy is particularly appropriate where at issue is the wellbeing of children…

> …
>
> An order under Rule 1(8) **may be made "at any time during a case"**, and the power to make such an order is in addition to any other power as the Rules may specify and exists unless the Rules expressly provided otherwise… (emphasis added)

The broad scope of the remedy allows the court to tailor a remedy which will encourage compliance with the court order. It is particularly important that remedies are responsive when there are children involved. For example, the remedy of an order postponing the trial or any other step in the case may not be appropriate if it is not in the best interest of the child.

Proof on a balance of probabilities

Justice Pazaratz cited Justice Conlon's decision of *C.J. v. E.J. (*2021 ONSC 4853) affirming that the onus is on the non-complying part to show on a balance of probabilities that either Rule 1(8) is not applicable, or that the court should exercise its discretion in favour of the non-compliant party (*K.M. v. J.R.*, at para. 32).

Legal Test

Justice Pazaratz summarized the legal test for relief under Rule 1(8) at paragraph 31 of his decision. A request for relief under Rule 1(8) entails a three-step analysis:

a. **The court must first determine if there is a triggering event**.

i. A triggering event exists when there has been non-compliance with a court order…

ii. There is no requirement that the violated order was made on a motion, and it doesn't matter who obtained the order.

iii. As long as the court is satisfied that there has been a failure to obey an order "in the case or a related case" Rule 1(8) is triggered…

b. If there has been a triggering event, **the court should then determine whether it is appropriate to exercise its discretion in favour of the non-complying party by not sanctioning that party** under subrule 1(8).

i. The onus is on the non-complying party to show why it would be appropriate for the Court to exercise its discretion in their favour…

ii. This discretion should only be exercised in the non-compliant party's favour in exceptional circumstances…

iii. The court's decision as to whether or not to exercise its discretion in favour of the non-complying party should take into account all relevant history of the litigation and, more specifically, the conduct of the non-complying party…

c. **If the court determines it should not exercise its discretion in favour of the non-complying party, it is then left with the very broad discretion as to the appropriate remedy** under Rule 1(8) ...Relevant considerations include:

i. The proportionality of the sanction to the wrongdoing;

ii. The similarity of sanctions in like circumstances;

iii. The presence of mitigating factors;

iv. The presence of aggravating factors;

v. Deterrence. (emphasis added)

The three-step analysis ensures that the court carefully analyzes whether there has been a breach of a court order, whereafter the court has the option of not sanctioning the non-complying party for the breach. If the court decides not to use its discretion to pardon the non-complying party, the court may then implement the appropriate remedy under Rule 1(8) proportionate to the non-complying party's conduct considering relevant mitigating and aggravating factors.

Conclusion

It is important that counsel have a clear understanding of the available enforcement mechanisms when advising clients about their enforcement options. Justice Pazaratz's

decision of *K.M. v. J.R.* (2024 ONSC 1338) and Justice Chozik's decision of *Barbara v. Cordeiro* (2024 ONSC 2951) illustrate the two independent enforcement options that may be available to your client, provided they meet the necessary requirements.

The contempt remedy is a remedy of last resort and will only be used in exceptional circumstances where a non-complying party's behaviour is serious and appears to be the only means to show them that court orders are not to be ignored. This remedy will only be used when there are not other adequate remedies available to address the non-compliance.

The contempt remedy requires proof beyond a reasonable doubt. This is a high threshold for litigants to meet and counsel will have to ensure that clients meet this evidentiary burden before requesting a court to exercise this exceptional remedy.

One of the requirements for the contempt remedy is that the relevant order was clear and unambiguous. This is an important reminder that draft orders need to be drafted in a clear manner. There should be no room left for interpretation.

The seriousness of the contempt remedy reflects its quasi-criminal nature. For this reason, judges will exercise caution when awarding this remedy in family law proceedings.

On the other hand, Rule 1(8) gives the court wide discretion in dealing with a party's failure to comply with a court order. It allows the court to tailor a purposeful and responsive remedy to ensure compliance in a particular set of circumstances. The rule encompasses several possible remedies, ensuring that the remedy is proportionate to the breach, while considering both mitigating and aggravating factors.

The burden of proof required is less onerous than the contempt remedy, as the non-complying party must show on a balance of probabilities that either Rule 1(8) is not applicable, or that the court should exercise its discretion to not sanction them.

Both remedies share the common goal of ensuring compliance with court orders. The nature of both remedies is remedial, rather than punitive. This is especially appropriate in family law proceedings as we should work towards de-escalating conflict and remaining resolution focused.

By understanding these distinct enforcement options, counsel will be able to overcome the hurdle of non-compliance and once again steer the matter towards resolution.

"There are medical records, and then there are medical records": Requesting disclosure relevant to a parent's mental health

Ainsley Doell

Overview

Where the issue of a parent's mental health is raised as a challenge to their ability to meet the needs of their children, requests may be made for the disclosure of medical records. In evaluating these requests, proportionality becomes more important than ever, due to the competing interests of full and frank disclosure and a parent's right to the privacy of their medical information. The tension between the two interests is explored by Justice Howard in his recent decision in *Sobieraj v. Karpenko* (2024 ONSC 2874).

Introduction

In many family law cases where parenting is an issue, one parent alleges that the other parent is not able to adequately meet the needs of the children. In some cases, this involves raising the issue of a mental health diagnosis or patterns of substance abuse.

Statistics Canada reported that in 2023 18% of Canadians aged 15 and older met the diagnostic criteria for a mood, anxiety, or substance abuse disorder in the previous 12 months.

Courts have made it clear that a mental health diagnosis is not itself a safety concern that warrants placing limitations on a person's parenting time (see for example *Gersimopolous v. Sambirsky*, 2024 ONSC 2368). However, where a compelling safety concern has been raised, an inquiry is necessary and courts are going to want to

review the best available evidence in order to make a determination regarding the child's best interests.

In some cases, the party alleging the safety concerns is going to request the disclosure of medical records and therapeutic notes, which is a clear imposition on the privacy rights of the other party. However, courts are going to want to see the best available evidence in order to make a determination about how a mental health diagnosis may impact the child.

The question becomes, how does the court balance their responsibility to review the best available evidence to make a decision in the best interest of a child against a parent's right to privacy?

As always, the starting point for making parenting orders should be the maximum contact principle – a child should have as much time with each parent as it consistent with their best interests. In this context, when undergoing an assessment of a child's best interests, it is also important to keep in mind that these kinds of concerns and disclosure requests are often, but not always, informed by the stigma attached to different mental health diagnoses.

While Justice Howard in *Sobieraj v. Karpenko* notes that an inquiry is needed to assess the potential impact of the Applicant Father's brief psychotic disorder on his ability to parent, he notes that the incident itself "does not necessarily mean, however, as the mother has apparently concluded, that [the child] will not be safe in the care of his father" (at para. 25).

Recent Decision: *Sobieraj v. Karpenko*

In *Sobieraj v. Karpenko*, Justice Howard writes regarding two competing parenting motions brought in the context of the Respondent Mother's motion to change a final parenting order regarding the parties' now 8-year-old son who has special needs.

Further to the final order of Justice Hebner, the parties' son's primary residence was with the Respondent Mother, subject to a detailed parenting schedule for the Applicant Father. However, in early 2024, the Applicant Father was hospitalized following an episode of a "brief psychotic disorder", raising concerns for the Respondent Mother that their son may not be safe in his father's care.

The Respondent Mother sought an order that the Applicant Father's parenting time be supervised. She also sought the production of all medical records from the facilities where the Applicant Father had been assessed or received mental health treatment in 2024, as well as the clinical notes and records of his treating psychologist. Her position was that any order for the Applicant Father's parenting time should flow from what was revealed through this disclosure.

The Applicant Father sought the dismissal of the Respondent Mother's motion and make up parenting time.

Best available information

Justice Howard notes at the outset that when making a determination relating to a child's best interests and parenting issues, courts "should have the best available information concerning everyone involved in the child's care and upbringing" (at para.19, citing *Noel v. Noel*, 2015 ONSC 4561).

He goes on to cite Rules 2(2) and (2(3) of the *Family Law Rules*, regarding the requirement for full and frank disclosure that is relevant and proportional, such that it enables just decision-making. Further, Rule 19(1)(4) requires the production of relevant records in a party's control, if requested.

However, there were two competing interests at play:

(1) Determining whether the Applicant Father's mental health diagnosis poses a valid safety concern with respect to his parenting ability; and

(2) The Applicant Father's interest in maintaining the privacy of his medical records.

In cases such as these, Justice Howard notes that "the court must balance the competing interests of a parents right to privacy against the interests in pursuing the truth to make an appropriate decision in the best interests of the child in order to make a sound disposition of the matter" (at para. 22).

In certain circumstances, it may be necessary for a parent's right to privacy to "yield in favour of the best interests of the child" (at para. 23).

Lewis v. Schuck (2018 ONSC 3887) is cited to support this proposition, but not discussed. In that case, the Applicant sought similar disclosure to the Respondent in *Sobieraj*. Justice Faieta noted that the Respondent's mental health and alcohol dependency were "central concerns" raised in the Application and addressed in the Answer, and that such concerns are relevant to a best interests analysis under section 24 of the *Children's Law Reform Act*.

It was also relevant that the Respondent had produced letters from and relied upon the reviews of his psychiatrist in responding to the Applicant's concerns (at para. 19). A similar 'waiver issue' is present in *Sobieraj v. Karpenko* and discussed below.

Justice Faieta ordered the disclosure of the Respondent's medical records, including "records from his family physician, psychiatrist … and any other medical, psychiatric or health professional and any hospital and addiction treatment facility solely in relation to the Respondent's mental health and alcohol dependency issues from January 1, 2015 to date" (at para. 39).

Disclosure of hospital records

In *Sobieraj*, during oral argument, the Applicant Father agreed to the disclosure of his hospital records, but Justice Howard intimates that he would have ordered this disclosure nonetheless.

As far as Justice Howard was concerned, the relevance of the hospital records from the Applicant Father's hospitalization was not in question, as they spoke to the nature of his mental health and whether the condition stood to impact his ability to parent.

The Applicant Father had produced a letter from his treating psychologist which concluded that he had no concerns about the Applicant's ability to care for himself or his child. Justice Howard notes that this is insufficient evidence, and that the matter of whether the child would be safe in his father's care was "at the end of the day, [a] question for the court to decide, not [the Applicant's] psychologist" (at para. 25). Among other things, the evidence of the psychologist did not address the potential for re-occurrence or relapse.

There was also a potential waiver issue: The Applicant Father had disclosed and relied upon the discharge summary from his hospital stay. Without the disclosure of the rest of the records, this would be allowing the Applicant Father to cherry pick.

However, the Respondent Mother's claim for the disclosure of medical records was not entirely successful. Her request for medical records was labelled as "speculative", as it went beyond the confirmed hospitalization to request "and/or any other medical facility where [the Applicant] has been assessed or received mental health treatment from January 1, 2024". This portion of her claim was denied.

Clinical notes and records of a treating psychologist

In addition to her request for the disclosure of hospital medical records, the Respondent Mother requested the clinical notes and records of the Applicant's psychologist from January 1, 2024 to date.

Justice Howard immediately highlights the highly invasive nature of this request, quoting case law speaking to the importance of confidentiality to the maintenance of an effective discourse between a therapist and their patient.

"In short", he says, "there are medical records, and then there are medical records" (at para. 44).

There are a few additional observations raised by Justice Howard, namely:

- The Applicant Father had been treated by his psychologist for years, and these notes had never been requested before the incident of psychosis;
- It is not clear how these "after-the-fact" notes and records would add to the truth seeking function of the court, especially where there is an order for the disclosure of the hospital records; and
- Counsel for the Respondent had submitted that little weight should be placed on the conclusions of the treating psychologist. If this is the case, then there would be limited merit in ordering the production of the notes.

In summation, ordering the production of these notes stood to be even more invasive than the production of the hospital records, while simultaneously having questionable utility. The request was struck, as it was "overly intrusive and not proportional to the issues before the court" (at para. 51).

Limitations

The Applicant Father raised concerns that if the requested production was allowed, the Respondent Mother might share these records with people outside the context of the litigation, including the parties' child.

Justice Howard took this concern seriously, and placed restrictions on both the Respondent Mother and her counsel's ability to use the disclosure that would be produced.

Specifically at paragraph 59, the following restrictions were put in place:

- The records could only be used for the purposes of the litigation at hand;
- The records would remain with counsel, and not be provided to the Respondent Mother, except that:
  - Counsel may share the content for the purpose of obtaining instructions, but may not provide a copy of any portion of the records; and
  - Counsel may share the records with a qualified medical expert for the purposes of providing an opinion, and the qualified medical expert is subject to the same restrictions on providing the disclosure to the Respondent Mother.
- Leave of the court would be required to share the disclosed records further;
- The Respondent Mother and her counsel are not to disclose the contents to any other person;
- After the expiry of the appeal period, the records shall be destroyed in a secure manner; and
- "Under no circumstances whatsoever" is the Respondent Mother to directly or indirectly disclose the content or even the existence of these medical records to their son, or any information therein.

Now what?

How the disclosure will impact parenting time for the Applicant Father would need to be determined following a review of the hospital records. Counsel for the Respondent Mother noted that an expert would likely be required to review the disclosure and provide an opinion.

In the meantime, Justice Howard ordered regular supervised parenting and contact via phone calls until the return of the motion.

The purpose of requesting and reviewing disclosure is to assess whether there are live safety concerns impacting the parent's ability to care for their child. Even if there are concerns raised, the question will become whether they are or can be effectively mitigated.

As discussed in the May 2024 edition of the *Ontario Family Law Monthly*, Justice Kraft's recent decision in *Gersimopolous v. Sambirsky* emphasizes that where a parent acknowledges a mental health diagnosis and is following a treatment plan, then the diagnosis itself should not prevent a parent from having meaningful parenting time with their child (2024 ONSC 2368).

Conclusion

When it comes to requesting disclosure relating to a parent's mental health, whether or not the disclosure should be ordered goes beyond simply determining relevance.

Because of the competing privacy interest at play, the proportionality of the request to the issues at play becomes more important than ever. No costs were awarded in *Sobieraj v. Karpenko*, because of the dismissal of the Respondent Mother's request for the disclosure of the psychologist's clinical notes and records. If her counsel had narrowed their focus to the records relating specifically to the hospital stay following

the episode of psychosis, which was the issue precipitating the need for the disclosure, this may have gone differently.

As the party or counsel for the party on the receiving end of such a disclosure request, *Sobieraj v. Karpenko* acts as a guide for what kinds of medical records should be produced willingly and which kinds of requests you may want to push back on.

However, even if the records requested are relevant and proportional, counsel can and should advocate for limitations being imposed to limit the scope of their use to the litigation at hand.

Sobieraj v. Karpenko also acts as a warning: If you intend to rely on material provided by a medical service provider (in this case, it was the discharge report), be prepared for a court to potentially find that you have waived your right to privacy.

Imputing income for underutilized assets: When should a spouse be required to exercise or sell stock options for support purposes?

Lesley Singer

Overview

This article reviews the recent decision of *Walker v. Walker* (2024 ONSC 198) and offers a discussion on imputing incomes in the context of stock options made available through employment remuneration.

This discussion includes a summary of the general principles that courts follow when imputing the income of a spouse who has not reasonably utilized property under s. 19(e) of the *Federal Child Support Guidelines*.

Introduction

(a) Overarching principles when imputing income for underutilized assets

As both child and spousal support are predicated on income, courts are sensitive to efforts to mask or understate income.

Section 19(1) of the *Federal Child Support Guidelines,* ("the *Guidelines*") identifies circumstances where it may be appropriate to impute a spouse's income. This article is concerned with those situations that fall under s.19(1)(e) of the *Guidelines*.

When a court imputes a party's income, in general, the "amount to be imputed must … be grounded in the evidence" and "reasonable in the circumstances" (*Michaud v. Kasali,* 2016 ONSC 443, at paras. 48-49).

Particular to s. 19(1)(e) of the *Guidelines*, a determination of whether property has been 'reasonably utilized' is an objective test (*Fielding v. Fielding,* 2018 ONSC 5659

at para. 73). This objective test has "regard to the entire context, including the extent to which a spouse is in fact generating income from their assets" and the party seeking the imputation bears the onus of illustrating its reasonableness. On this point, s.19(1)(e) cannot be used merely to monitor "the manner in which a party manages his or her financial affairs, which is beyond the purpose of the provision, or the manner in which it has been judicially interpreted" (at para. 83).

While investment income is part of a payor's total income, the underlying investments are not. Pursuant to s.19(1)(e), income that can be derived from capital may be imputed as income. However, a payor is generally not required to sell capital unless it is not being reasonably utilized to generate income *(Bak v. Dobell*, 2007 ONCA 304 at para. 52).

(b) A typical s.19(1)(e) scenario - failing to generate rental income

There is an abundance of cases where courts rely upon s.19(1)(e) of the *Guidelines* to impute a spouse's income when a spouse could use his or her property to generate rental income.

For example, in *Lefebre v. Lefebre* (2020 ONSC 311), a spousal support recipient claimed she would be unable to generate income from renting out her cottage, from which she previously generated both modest and significant rental income. The recipient argued that she was not able to rent the cottage because she lacked a property manager and the cottage's accompanying barn required some renovations. Taking issue with the recipient's credibility, Justice Fryer rejected this alleged obstacle, stating that:

> I do not accept that [the recipient] is unable to generate an income from the cottage property … It appears that [the recipient] only stopped marketing the cottage on various rental websites when she realized the [recipient] was going to introduce the evidence at trial (at paras. 353 & 355).

Thus, pursuant to s.19(1)(e), the cottage property was not reasonably utilized. The recipient's income was imputed to the "rational and reasonable amount" of $15,000 in net income for the years that the cottage ought to have been rented out (at para. 361).

S.19(1) and its application to stock options

S.19(1)(e) of the *Guidelines* is also applicable to circumstances where a spouse has access to stock options through his or her employment remuneration package. When stock options are available, an employee can exercise (i.e., purchase) company shares, generally at a below-market price, which vest after a prescribed period. Once vested, the employee's shares can be sold.

With this in mind, the court must weigh various factors to determine if it should impute income to the spouse for failure to exercise or sell his or her stock options. This query is central to Justice Audet's recent decision, *Walker v. Walker* (2024 ONSC 198).

Differential treatment of income from stock options under the *Guidelines* and the *Income Tax Act*

Under the *Income Tax Act,* exercised stock options are not considered a form of income. It is only when the underlying shares are sold that those proceeds may go towards the payor's income. (*Walker*, at para. 46)

On the other hand, pursuant to Schedule III and s. 13(1) of the *Guidelines*, once exercised, the value of the shares form part of the payor's income for that respective year. The capital gains, realized upon the selling of the shares, go towards the payor's

income for the year they are sold. Accordingly, the cash value of those shares is deducted from the gains realized to avoid double-dipping (at para. 47).

Under s.19(1)(e), timing matters in the exercise and selling of stock options

While the timing for when to include income generated through stock options is clear under the *Guidelines*, there is ambiguity in whether "the payor should be left with complete discretion as to the *timing* for the exercise of available stock options or the sale of the underlying shares".

There is a risk in granting a payor total discretion to determine when to sell stock options. That risk is that they can "choose whether and when to exercise stock options and delay the sale of the underlying shares (once vested) to defer compensation for many years and 'shield income' beyond the time when support terminates" (Walker, at para. 50).

The above situation arose in *Patterson v. Patterson* (2006 CanLII 53701 (ONSC), one of the seminal cases on underutilized stock options, which provided clarity to the *Guidelines.* In *Patterson*, the husband, through his employment, was entitled to annual, restricted shares that were held in trust for three years. Upon vesting, he could either leave the shares to generate trust income or take them out. The latter option would enable him to sell and realize a sizeable capital gain on the shares. Having decided to leave the shares in trust, the payor deferred sizeable income from his tax returns. *Patterson* is therefore a "selling" case.

A key component of the *Patterson* decision, according to Justice Audet, is that the payor's intentional deferral of significant income was guaranteed to be available to him upon vesting. The court in *Patterson* rejected the payor's argument that he was making an investment decision, noting that the only advantage in keeping the shares in trust was to shield his income. Since the payor's shares were "reasonably available

once vested and [were] within the [payor's] control", the court held that it "is fair to deem that he will exercise the shares as soon as they are vested" (*Patterson,* at para. 104).

Importantly, in *Patterson*, the court concluded that both the timing of a payor's exercise of stock options and the sale of those underlying shares is relevant and can be considered under s.19(1(e) of the *Guidelines*. Stock options available to a payor can therefore be added to his or her income for support purposes the year they vest, even if neither exercised nor sold.

A guide to imputing income to a payor for unexercised stock options or unrealized shares

In *Walker,* Justice Audet held that the income of a payor with unexercised stock options or a payor who has failed to sell vested shares should not be automatically imputed. Rather, a careful, multi-factored analysis is required, in recognition of the fact that there may be valid reasons for the payor's decision. Justice Audet, at paragraph 61, provides a detailed, non-exhaustive list of factors to consider for both stock option scenarios, including:

a. What are the terms pursuant to which stock options can be exercised?

b. Is the employee required to finance the purchase?

…

d. Is there a requirement for the employee to pay a portion of the purchase price up front (in which case the employee must have immediate access to cash)?

…

f. Would a reasonable person in the same circumstances exercise the stock options?

g. What was the employee/payor's practice in relation to the exercise of stock options during the marriage? Has his/her practice changed post-separation? Is there a valid justification for such change? What would have likely happened if the family had remained intact?

…

h. What are the terms upon which vested shares can be realized?

i. What are the restrictions, if any, associated with their sale?

…

l. What are the reasons/justifications for the deferral? For instance, if company is not performing well and the shares would be sold at a low profit, a deferral might be reasonably justified;

The chief consideration in the sale of underlying vested shares is if valid reasons for the deferral of available compensation exists, or rather if the employee is intentionally attempting to minimize ongoing or prospective support obligations.

The nature of the support obligation may also be a key factor

Justice Audet affirms that without context-specific, valid reasons for doing so, a payor should not be permitted to delay readily available compensation at the expense of his or her children's current needs and well-being.

In the context of compensatory-based spousal support, a payor who has exercised stock options may have a greater responsibility elect to immediately receive compensation once it becomes available. Poor market conditions, however, may justify a deferral.

Application of to the facts in *Walker*

In *Walker,* the payor had access to a Share Purchase Plan ("the Plan") through his employment that would grant him "significant financial benefits, in the form of the cash value received at the time he exercises his stock options, in the form of dividends payable on Paid Shares, and in the form of capital gains he realizes when he sells the underlying shares in the manner permitted by the Plan" (at para. 49).

The payor, however, only partially exercised stock option from the Plan. In comparison to *Patterson* however, there was no indication the payor's decision was "for the purpose of minimizing his support obligations". On the contrary, Justice Audet found that the payor's reasons for not fully exercising the Plan "made sense" and "provided a reasonable explanation for the financial decisions he made during those years" (*Walker*, at para 66). For example, the payor invested in real estate to build himself a new home and was unsure about his future financial situation given the ongoing litigation with the recipient.

Given this, Justice Audet did not impute additional income to the payor under s.19(1)(e) to account for either his unexercised stock options or for the capital gains the payor would have realized upon selling his vested shares. The court gave weight to the fact that the company, who employed the payor, required employees to come up with 1/3 of the stock option purchase price. Furthermore, significant restrictions were imposed on an employee's ability to sell the shares.

Instead, the court imputed the payor's income only to reflect the cash value of the stock options that he did exercise in the year that they were purchased. With respect to future sales of any underlying shares, those capital gains would be added to his income for support purposes the year that they would be sold.

Conclusion

Under S.19(1)(e) of the *Guidelines*, courts are empowered to impute income for underutilized stock options for support purposes. Under the Guidelines, stock options become part of a payor's income as soon as they are exercised, which unfortunately incentivizes some to shield their income. This is why courts can consider the timing of the exercise and selling of stock options and can add income to the year they vest, even if never exercised.

The factors set out in Justice Audet's *Walker* decision provide courts with a thorough and helpful roadmap towards determining the reasonableness of imputing income related to stock options. Therefore, the support payor will need to offer up credible explanations for not realizing available income. Conversely, payors will need to show circumstances where it is objectively prudent or financially difficult not to pull the trigger and exercise their available stock options.