2011-26 — Epstein's This Week in Family Law

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Whether a Custody/Access Assessment Should Be Ordered

Jarvis v. Landry, 2011 CarswellNS 169 (N.S. S.C.): Honourable Justice Elizabeth Jollimore Justice Jollimore has been busy again and seems to be turning out quite an incredible number of family law judgments. The more important one this week is a Contino analysis in *Foss v. Foss* (see below).

This case is about whether a custody and access assessment should be ordered and failing that, whether a "children's wish" report should be ordered. Justice Jollimore dismisses both motions. While she recognizes that she has the right under the *Judicature Act* in Nova Scotia to order an assessment, generally speaking, she agrees with *Deveau v. Reid*, 2004 CarswellNS 624 (N.S. S.C.) that assessments should not be ordered where there is no clinical issue. Even if there is not a clinical issue, there still may be an assessment, but that is a discretionary decision in which the children's best interests must be considered. Justice Jollimore relied heavily on *Farmakoulas v. McInnis*, 23 R.F.L. (4th) 235 (N.S. S.C.) where Justice Edwards summarized the law relating to assessments. The burden is on the party requesting the assessment to show that a professional opinion is required and where there is a need for the type of information generated by an assessment. That is, where the assessment is likely to provide information not otherwise available because the information falls within the special knowledge of the expert. There was no such indication in this case and, thus, the mother had not discharged the burden of proving a need for an assessment.

Justice Jollimore was not buying a children's wish report either. The children were seven years old and simply too young to have a view that would be relevant to the trial judge. Justice Jollimore makes passing reference to Justice Martinson's important decision about the U.N. *Convention on the Rights of the Child* in *G. (B.J.) v. G. (D.L.)*, 89 R.F.L. (6th) 103 (Y.T. S.C.), but notes that the right of the children to have a voice is not absolute and children must be capable of forming their own views. That is not the case with a seven-year-old and, in any event, the mother did not put forward any evidence as to the children's capability to form their own views.

Assessments are costly and time consuming and the children's wish reports for young children do not add anything to the dispute and, in fact, can make matters worse. This simply was not a case for expert evidence and Justice Jollimore rightly recognized that.

Annulment v. Divorce

Grewal v. Kaur, 2011 CarswellOnt 2113 (Ont. S.C.J.): This is a very tangled web about annulment and divorce and immigration fraud and marriages of convenience and conflicts of laws. If you are going to work your way through it, I promise you a good story.

The issue for the Court was whether there could be an annulment or a divorce. The essence of the claim is that the wife wanted to immigrate to Canada and she entered into a marriage that the husband thought was entirely valid. In essence, he was tricked into marrying her in India so that he could sponsor her to come to Canada. The husband, understandably, wanted an annulment and the wife wanted a divorce.

There was no question that the marriage between the parties was formally valid under the laws of India, the place where it was celebrated. Justice Sproat had heard a summary judgment motion in this same case back in 2009, and he concluded that the marriage was valid and could not be annulled under Ontario law, on the basis that he was bound by the Court of Appeal decision in *Iantsis (Papatheodorou) v. Papatheodorou*, 3 R.F.L. 158 (Ont. C.A.) to the effect that immigration fraud is not a proper ground for annulment under Ontario law. This takes Justice van Rensburg into looking at Indian law and hearing expert evidence under the *Hindu Marriage Act*. He concludes that our law does not recognize immigration fraud as a ground for annulment of marriage. But, I am not so sure. I agree that where the parties intend to go through a marriage ceremony for the purposes of jointly deceiving the immigration authorities, then that would not be a case for an annulment. But, what of the husband here? He entered into what he thought was a valid marriage and did not know that he was the victim of fraud until after the marriage was over and the wife refused to live with him. Is not this marriage voidable and does Ontario not have jurisdiction, given that the husband is ordinarily resident here and, in fact, domiciled here? Well, not so according to *Iantsis*.

Justice van Rensburg explores this issue and comes to the conclusion that Ontario does have jurisdiction to grant an annulment based on the husband's domicile in Ontario. Justice van Rensburg then recognises that the next step is to describe the legal nature of the problem according to the law of the forum or the *lex fori*.

> The essential validity of a marriage is comprised of the legal capacity to marry (prohibited degrees of consanguinity and affinity and prior subsisting marriage; non-age; ability to consummate the marriage) and consent (capacity to understand, absence of duress, absence of mistake/fraud). The law of the same jurisdiction will not necessarily apply to each of these factors.

> It has already been determined in this case that the marriage would be valid under Ontario law if Aman's consent was procured by Simar's fraud and misrepresentation. Accordingly, if the law of Ontario is applicable to determine the issue of essential validity, the marriage could not be annulled. It is only if the marriage could be annulled under Indian law, and if that law applies to the question of consent in this case, that an annulment could be granted.

This then takes him to the applicable law of India. There is some seriously conflicting evidence about what the law of India actually is in these circumstances. Justice van Rensburg goes off on a different tack and recognizes that the court has jurisdiction to refuse to apply foreign law on public policy grounds. He then moves to a detailed analysis of the question of consent and then says:

> One approach is to apply the law of the domicile of each party at the time of the marriage. Under the "dual domicile" theory, if the marriage was not essentially valid under the law of each party's prenuptial domicile, the marriage is voidable. This is the approach put forward by the authors of Dicey, Morris and Collins on the Conflict of Laws. This view is based on the idea that the community to which each party belongs is most interested in his or her status.
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> In dealing with the issue of consent, under the dual domicile test, a marriage would be invalid if either party's consent were vitiated under the law of their antenuptial domicile. In the 1949 U.K. decision in *Kenward v. Kenward*, [1949] 2 All E.R. 959 (Prob. Div. & Adm.)(rev'd on appeal at [1950] 2 All E.R. 297 (C.A.), the Court states that since marriage is a voluntary union, the question of consent is to be determined by applying the personal law of each party at the time of the marriage. See also *Szechter v. Szechter* [1970] 3 All E.R. 905.

There is a detailed discussion in this case about the choice of law issue. There is then a discussion of the controversial decision of *Torfehnejad v. Salimi*, 32 R.F.L. (6th) 115 (Ont. S.C.J.), which was upheld by the Ontario Court of Appeal. In that case, an annulment was granted in circumstances where the wife, while domiciled in Iran, had entered into a marriage in Iran with a Canadian domiciliary for the sole purpose of emigrating to Canada. In that case, Greer, J. applied Iranian law, but Justice van Rensburg distinguished it from this case on the basis that Iranian law treated marriage as a contractual arrangement, whereas under Hindu law, a marriage was both a contract and a sacrament. Justice van Rensburg preferred to rely on Justice Sproat's analysis and conclusion in *Iantsis* that Ontario could not grant an annulment. I think that the Court of Appeal needs to review *Iantsis* in these kinds of circumstances. I am not sure why on public policy principles, or any other for that matter, that the husband, who has been defrauded, could not obtain an annulment. I think that there is some strength in the argument that this was a voidable marriage and once Justice van Rensburg found as a fact that the wife never intended to live with the husband, that might have been sufficient to grant an annulment. However, I recognize that Justice Sproat and Justice van Rensburg were bound by *Iantsis* for the time being and until the Court of Appeal for Ontario reviews it, the safer route is to seek

a divorce as opposed to an annulment. I am sure that an annulment may well have different immigration consequences for the wife and that was likely why the battle was so hard fought. I suspect that had the annulment been granted, the wife's right to emigrate to Canada might well have been revoked.

Calculating Income for Child Support Purposes

Thomson v. Richardson, 2011 CarswellOnt 2064 (Ont. S.C.J.): Victories for support payors are few and far between, but Justice Sachs, in the Ontario Superior Court of Justice, carved one out for the husband in this case. This was a fight about how to calculate income for child support purposes. Normally that issue is strictly determined by the Guidelines. However, in this case, the father's position was that when he was self employed, he paid support on his billings, not on the basis of his income that he actually took out from the company. That is, the income tax returns showed less income than the way in which the husband calculated it and upon which he paid support. However, in a recent period, the wife wanted him to pay support based on his income as declared for income tax purposes, as opposed to his billings. The father points out that when it suits her, the wife looks to the income as declared to Revenue Canada and when it does not, she looks to his actual billings. Justice Sachs said the following:

> I agree with the father. While ordinarily income for child support purposes is calculated on the basis of income as declared for tax purposes, including dividends, this is not the basis on which these parties have chosen to calculate child support. Rather, in putting the figures before me, they have used the amounts as billed (before expenses) or earned by the father, whether through his company or otherwise. In almost all cases this has resulted in a higher income being attributed to the father. Given this, it would be unfair to in effect change the rules of the game for the one year when using a different way of calculating the father's income for support purposes benefits the mother.

I must confess a little bit of surprise about this because one would have thought that how one calculates income is abundantly clear under the Guidelines and that, generally speaking, the courts are not sympathetic to parties who try to make other arrangements when it might affect the amount of child support being paid. However, fair is fair and it does seem to be eminently sensible to hold the parties to their bargain, particularly, when no one alleges that the children have suffered by the way in which the father has calculated the support.

Support Recipients Have a Duty to Contribute Reasonably to Their Own Support and That of Their Children

Moon v. Moon, 2011 CarswellOnt 2086 (Ont. S.C.J.): In a similar vein and another victory for a support payor, Justice Corbett, in the Ontario Superior Court of Justice, sent out a strong message that everyone has an obligation to contribute to their own support and the support of their children. The wife in this case was a stay-at-home mother. She appeared not to be interested at all in re-enter-

ing the workforce. Justice Corbett found that she should have taken steps to re-enter the workforce already and must do so now.

The parties had entered into minutes of settlement, in which the husband agreed to pay the wife $1,318 per month spousal support subject only to a material change clause. The minutes of settlement and consent order were silent on the wife's obligation to seek employment and was silent on the time period for support. That raises the question as to whether the failure to take steps to re-enter the workforce can ground a variation application. The father argues as follows:

> Mr. Moon argues that the obligation to pursue self-sufficiency and the obligation to support the children is found in the *Divorce Act*, and that, in the absence of an agreement or order to the contrary, a recipient has a duty to take reasonable steps to become self-supporting. The extent of that duty will vary depending on the overall circumstances of the case; a stay-at-home mother who lacks working experience and education will face greater obstacles contributing to her own self-sufficiency. The older a recipient is, and the longer she has been out of the workforce, the more daunting the challenge. And to the extent that a family is affluent on the basis of the support payor's income, the less material may be any contribution the support recipient could reasonably make by entering the workforce. This list is not exhaustive, of course: the ages and stages of the children, the ages of the spouses and length of the marriage, and any special health or other circumstances would also have to be taken into account. But, the argument goes, in the absence of factors to the contrary, as a general proposition, support recipients have a duty to contribute reasonably to their own support and that of their children.

Justice Corbett was buying and concluded that the absence of specific terms in the minutes of settlement did not imply that the wife could stay out of the workforce indefinitely.

It is important to note that the wife has had significant education and training. She was 44 at the time of the separation. The children are 14, 12 and 10 years of age and are at school full time. The mother did some peripatetic retraining, but Justice Corbett found that she had decided that she did not have an obligation to re-enter the workforce and contribute to her own support and that of her children. He rejected the idea that the role of a homemaker for three school-age children precluded meaningful efforts of employment or retraining. He went on to note that there was an obvious way to make both possible and that was daycare. Given the significant cost of daycare in Ontario, no one seems to have factored in how much the mother would actually have left after daycare was paid, but that was not the point. Justice Corbett noted that:

> . . .she is now 47 years old. If she embarks on retraining now, with devotion comparable to full-time employment, and re-enters the workforce in three years at professional or executive levels of compensation, she might expect 10-15 years of employment before retirement, perhaps somewhat longer depending on her field, her health, and her wishes. If she had started this process four years ago, she could have been in the workforce now, or would be about to enter it, increasing her years working by around 15-30 per cent. Every year that goes by is a lost year's income. And, being realistic, it is

> surely trite to observe that the older one is entering the workforce, the more difficult it may be to find suitable employment. With each year that goes by with no progress towards economic self-sufficiency, the greater the risk that Ms. Moon will never achieve it. And this points to several baleful prospects. Ms. Moon's child may feel saddled with financial responsibility for her at a time in their lives when they have their own families to raise. Ms. Moon may pursue Mr. Moon for support, and rely on her status as a non-working mother for so many years after separation. Or, perhaps worst for Ms. Moon, she may drift inexorably into poverty, living on meagre savings, perhaps supplemented by social assistance. And to the extent that Mr. Moon is called upon to continue to support Ms. Moon, he will be unable to build wealth for his own retirement or to fund his children's post-secondary education.

Justice Corbett recognized that the remedy might be to order time-limited support or order "step-down" spousal support with a termination date at some point in the future. Taking all of the factors into account, Justice Corbett ordered that spousal support should not be varied between now and August 31, 2011. Effective September 1, 2011, the husband should pay spousal support of $350 per month based on an imputed income to the wife of $25,000 and effective September 1, 2016, spousal support shall terminate. Justice Corbett then added that "(spousal support) shall be non variable by either party". I do not think that Justice Corbett has jurisdiction to make a non variable order in light of the provisions of the Divorce Act, however, his message was clear.

The parties then got into a discussion about access and Justice Corbett delivered a stern lecture on the proper role for parents. This led Justice Corbett into some quite hilarious personal recollections and I will not spoil the story by repeating it here. I commend this rather forceful and interesting decision to you all.

Child Support – *Contino* Analysis

Foss v. Foss, 2011 CarswellNS 168 (N.S. S.C.): This is a very well reasoned *Contino* case and it is an analysis that we do not see very often. Many judges simply throw up their hands when faced with a shared custody situation and start with a set-off number and then adjust it slightly upwards. Not so with Justice Jollimore, who follows the mandate set down by Justice Bastarache in *Contino* and does a careful analysis resulting in not only not using a set-off number, but, somewhat surprisingly to the father-payor, does not adjust the table amount at all.

The father was paying $500 per month for child support, but he was doing that before the parties entered into a shared parenting arrangement. The father's income has gone up somewhat and the mother's income has dramatically gone up. The father sought to vary his child support based on those two material changes and Justice Jollimore found that they were indeed material changes and that she had jurisdiction to entertain the application.

The Court then turned to a detailed analysis of *Contino* and noted that in this particular case she had enough material to do the *Contino* analysis as suggested by Justice Bastarache. Having enough information to do a full *Contino* analysis

is a rare animal. It requires detailed statements of income and assets, detailed household budgets, clear allocations between children's expenses and adult's expenses, details of other income for other members of the household and net worth statements.

In this case, the Court had most of it and away Justice Jollimore went in doing the analysis. It is a very instructive case. She begins by noting that the set-off amount, which would have been $255 in this case, has no presumptive value and thus Justice Jollimore embarks upon a careful study of the children's costs in each household.

There was a detailed presentation of total incomes in each household, the assets of each parent, the allocations of children's expenses and the monthly parenting responsibilities in each household.

While the household costs were not dissimilar, it was apparent that the mother was getting assistance from her mother, otherwise, the standards of living in both households would have been significantly disproportionate. Since the most fundamental principle is that child support is an obligation of the parents, Justice Jollimore took into account the fact that the grandmother was assisting the family and that this was partly the father's responsibility. Justice Jollimore said the following:

> I have determined that the set-off amount compensates Dawn Foss for the additional costs she incurs as a result of the shared parenting arrangement and the costs that she alone bears for the girls. However, the set-off amount doesn't allow her to replicate the extras which are available to the girls at their father's home. At present, the consistency in the girls' homes resulting from Marie MacIsaac's financial contribution, not from the appropriate sharing of the child support obligation between Dawn Foss and Clint Foss. To ensure that each parent has the ability to absorb the costs required to maintain the appropriate standard of living in these circumstances, I order that Mr. Foss continue to pay child support of $500 each month. Both parents should have the ability to provide the same level of comfort to the girls and this ability should derive from the parents' incomes, not the income of a non-parent.

Thus, the father ends up paying the same amount of child support as he has since the parents' divorce, although his time with the children has increased and the mother's income has substantially increased. However, all that glitters is not gold and those changes did not yield a lower child support number for the father. The father was partly done in by the fact that his increase in income also increased his child support obligation.

The mother asked that the father be ordered not to apply for the Canada child tax benefit, even though he provides the children with their primary residence for one half of the year. Justice Jollimore notes that there are various decisions from the Tax Court of Canada that remind her that she cannot rewrite the *Income Tax Act*. Thus, she recognized that she could not order the father not to apply for the

child tax credit. However, there is more than one way to solve that problem. Justice Jollimore says:

> I acknowledge the importance of the government funds that Dawn Foss receives. Her receipt of them is a factor in my determination of the appropriate amount of child support to be paid to her. The money is critical to the support of the children in her home. The order shall recite that Dawn Foss receives these benefits and that their loss by virtue of Clint Foss' application for them is a change in circumstances.

Obviously, this will dissuade the father from applying for the child tax credit.

All in all, a clear and concise and very detailed *Contino* analysis and another lesson about why section 9 needs to be changed, because who can afford the time and expense for this kind of exercise? Kudos, however, to Justice Jollimore for slogging through it.

Refusal to Sever a Divorce

Al-Khouri v. Al-Khouri, 2011 CarswellNS 176 (N.S. S.C.): It is not often that you see a refusal by a court to sever a divorce. However, Justice Forgeron, in the Nova Scotia Supreme Court, did exactly that. She reviewed all of the leading cases where severance was or was not granted and concluded that in this case, the husband had not proved on the balance of probabilities that a severance of the divorce and corollary relief proceeding was an appropriate exercise of the court's jurisdiction. There was financial prejudice that was going to attach to the wife if severance was granted since the husband intended to immediately remarry and that was going to jeopardise the life insurance provisions and the estate provisions of the husband's estate. The trial was only a few months away and it seemed that the husband's main argument was that he wanted to marry his common-law partner because he never learned to cook or clean and he wanted a wife to attend to these tasks and serve him. I think that likely set off Justice Forgeron and was not the best argument to make in support of a severance argument. There is nothing particularly new here, but a good collection of the case law for and against severance and is a useful case to keep on hand.