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YARED v. KARAM: THE SUPREME COURT OF CANADA RULES THAT A FAMILY RESIDENCE HELD IN TRUST IS INCLUDED IN QUEBEC'S FAMILY PATRIMONY

— Troy McEachren, TEP, Partner, Miller Thomson LLP.

The Supreme Court of Canada rendered a groundbreaking family law decision that will have an impact far beyond family law. The decision involved a residence purchased by a trust and whether the value of the residence should be included in Quebec's family patrimony regime, which is a remedial set of family law rules that aim to foster economic equality between spouses with respect to certain properties more fully described in article 415 of the *Civil Code of Québec* (the "CCQ").

Following tragic news in 2011 that Ms. Yared was suffering from incurable cancer, she and her husband Mr. Karam moved to Montréal. In light of this news, Mr. Karam decided to establish a trust to protect the family's assets for the benefit of Ms. Yared and the couple's four children who were the beneficiaries of the trust although Mr. Karam could add himself as a beneficiary pursuant to the exercise of a special power of appointment that he held as trustee. The trustees are Mr. Karam and his mother. Both spouses contributed assets to the trust, which were used to acquire a residence on Doctor-Penfield Avenue in Montréal for the sum of $2,250,000. The family moved into the residence in 2012.

In 2014, Ms. Yared moved out of the residence and started divorce proceedings, which were not completed prior to her death in 2015. Litigation followed between the liquidators of Ms. Yared's estate and Mr. Karam over the inclusion of the value of the residence in the family patrimony regime. If it were not included, Ms. Yared's estate would have little value.

Article 415 CCQ includes both the ownership of family residences as well the "rights which confer use" of such residences. The issue before the Supreme Court was how the words "rights which confer use" in article 415 CCQ applied in the context of a discretionary family trust that purchased a family residence. The previous decisions of the Quebec courts involving the family patrimony and trusts related to residences that were owned by the spouses and that were subsequently transferred to a trust.

In the first instance, the Superior Court of Québec applied by analogy the concept of "lifting the trust veil" from corporate law as well as the "rights which confer use" found in article 415 CCQ to conclude that the value of the residence was indeed part of the family patrimony. The Court of Appeal allowed the appeal.

At the Supreme Court of Canada, Rowe J., a common law judge who wrote the decision for the majority, granted the appeal and affirmed the decision in the first instance. The majority rejected the analogy to the corporate concept of "lifting the veil" given that the relevant family law provisions of the CCQ provided an adequate answer to the question before the court.

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The majority recognized that under the CCQ, none of the settlor, trustee and beneficiary have ownership rights (rights in rem) in trust property but determined that what may or may not constitute a "right which confers use" in article 415 CCQ is dependent on the relation to the level of control exercised by either spouse with respect to the residence. They also held that the intention of the parties in creating the trust was irrelevant except to determine that the residence was used by the family. In the context of a trust, Rowe J. stated that if a spouse has the right to control the entitlement to the value of the assets as well as the right to control who may benefit from the use of the property then the value of the residence should be included in the family patrimony.

Rowe J. found that Mr. Karam had sufficient control over the trust given that he was a trustee and given his power of appointment to name beneficiaries (including himself), the power to remove a beneficiary and the power to determine how the income and capital of the trust would be distributed. Thus, Mr. Karam held the rights which confer use, therefore the value of the residence was to be included in the family patrimony as belonging to him.

Mme Justice Côté, a civil law judge, writing for the minority, held that the appeal should be dismissed. She recognized that while the family patrimony is of public order it does not oblige spouses to purchase family patrimony property. Just as parties are free to rent a residence, they are free to arrange their affairs in any other manner so long as they do not act with the intention of defeating the family patrimony. The uncontested evidence was that Mr. Karam settled the trust to protect his wife and children, not to defeat the family patrimony.

Unlike the majority, Côté J. characterized Mr. Karam's ability to determine who was a beneficiary and what they could get from the trust as a trustee power subject to fiduciary duties and not rights within the meaning of article 415 CCQ. Instead, only rights as a beneficiary or rights pursuant to an agreement to use trust property are "rights which confer use" in the context of article 415 CCQ. According to Côté J., if the residence were to be included in the family patrimony, it would be included equally between Ms. Yared and Mr. Karam pursuant to a tacit right between them and the trustees or in the hands of Ms. Yared as she was a beneficiary while Mr. Yared was not.

Unfortunately, the saga for this family has not ended as many vexatious questions remain, such as how Ms. Yared's succession is to satisfy the receivable now forming part of the succession and the fairness of the result to Mr. Karam as he has no right to the trust assets to satisfy the claim unless he were to exercise his power to appoint himself a beneficiary, which would no doubt be subject to attack. Thus, the children could receive effectively 150% of the value of the residence, to which they would not have been entitled if the residence had been owned by Mr. Yared. This is due to the fact that they are the sole heirs of Ms. Yared's succession which has a claim under the family patrimony against Mr. Karam (50%) and as they are the sole beneficiaries of the trust that owns the residence (100%).

The majority's judgment also leaves open the question as to at which point the powers of a trustee-spouse can be diluted so as to no longer qualify as a "right which confers use." The majority's focus on trustee powers rather than rights of a beneficiary will no doubt lead to prospective asset protection purposes in an attempt to avoid the application of the family patrimony and other matrimonial rights.

LEGISLATION UPDATE

Alberta

Bill 28, the *Family Statutes Amendment Act, 2018,* received Third Reading on December 4, 2018, Royal Assent on December 11, 2018, and is effective December 11, 2018, with certain amendments coming into force on January 1, 2020. Bill 28 amends the *Matrimonial Property Act*, RSA 2000, c. M-8, and the *Family Law Act*, SA 2003, c. F-4.5. Effective January 2020, the rules for property division under the *Matrimonial Property Act* are extended to include adult interdependent partners, as well as married spouses, and the *Matrimonial Property Act* will be renamed the *Family Property Act*, RSA 2000, c F 4.7. Bill 28 also repeals the *Married Women's Act*, RSA 2000, c. M-6.

Prince Edward Island

Bill 30, the *Child and Youth Advocate Act*, received Third Reading on November 20, 2019, and Royal Assent on November 28, 2019. Bill 30 enacts the *Child and Youth Advocate Act*, which establishes the Office of the Child and Youth Advocate as independent from government and reporting to the province's Legislative Assembly. The intent of the proposed Act is,

amongst other things, that it be consistent with the United Nations Convention on the Rights of the Child; that it recognize the importance of the preservation and promotion of cultural identity for Indigenous children and youth; and that the provincial government commit to ensuring that the rights and views of children and youth are considered in matters that affect them. The Act will be proclaimed into force on April 3, 2020, with the exception of section 2, which will be proclaimed into force on January 18, 2020.

Saskatchewan

Bill 205, *The Children's Law Act, 2019*, received First Reading on December 3, 2019. Bill 205 repeals *The Children's Law Act, 1997*, and enacts *The Children's Law Act, 2019*. Amongst other changes, the new Act introduces the terms "decision making responsibility" and "parenting time" in place of "custody" and "access"; expands the best interests of the child factors that are to be the only consideration when making a parenting order; and introduces provisions respecting the relocation of the child, including best interests of the child factors to be considered in a relocation application.

Bill 98, *The Miscellaneous Statutes (Family Dispute Resolution) Amendment Act, 2018*, received Royal Assent on May 9, 2018. Bill 98 amends legislation including *The Children's Law Act, 1997*, SS 1997, c. C-8.2, the *Family Maintenance Act, 1997*, SS 1997, c. F-6.2, and *The Family Property Act*, SS 1997, c F-6.3. Bill 98, amongst other changes, adds definitions of "family arbitrator" and "family mediator" and adds a provision to expressly allow for arbitration in a matter to which the Acts apply. Portions of Bill 98 were proclaimed into force on January 1, 2020. The portions proclaimed are in paragraph 2(2)(*b*) of *The Children's Law Act, 1997*, which provides the definition of "family mediator"; that portion of subsection 2(3) that enacts section 10 of *The Children's Law Act, 1997*; subsection 2(5); subsection 3(2) of *The Family Maintenance Act, 1997*, which provides the definition of "family mediator"; that portion of subsection 3(3) that enacts section 15 of *The Family Maintenance Act, 1997*; and section 5.

RECENT CASES

Judge Erred in Finding No Jurisdiction to Hear Retroactive Child Support Application

Alberta Court of Appeal, November 1, 2019

The parties had three children. Pursuant to their 2004 divorce and corollary relief order, the appellant wife had custody of the children and the respondent father was required to pay child support. Under a 2009 parenting and support agreement, the child support was set at $2,563 per month, based on the father's 2007 income of $140,000. The mother's 2007 income was $17,840. In May 2016, the mother informed the father by letter that child support was inadequate. She served an unfiled application/notice to disclose with demand for financial disclosure. At this time, the three children were still "children of the marriage". Pursuant to an application, the chambers judge found that the father's income between 2014 and 2016 ranged from $317,087 to $220,736. In October 2017, the mother applied for retroactive child support from 2010 for all three children. After finding that the two older children were no longer "children of the marriage" at the time the mother's 2017 application was made, the chambers judge awarded the mother retroactive support from January 2014 for the youngest child only. The chambers judge had relied on *D.B.S. v. S.R.G.*, 2006 SCC 37, 2006 CFLG ¶ 26,140 ("*D.B.S.*"), and *Calver v. Calver*, 2014 ABCA 63, 2014 CFLG ¶ 26,970, in finding that he had no jurisdiction to hear the application in relation to the two older children. The chambers judge found that an unfiled notice to disclose did not constitute an "application" as contemplated in the *Henry* exception from *D.B.S.* and, as such, there was no jurisdiction. The mother appealed.

The appeal was allowed. Pentelechuk JA, with Feehan JA concurring in the result, found that the chambers judge erred in finding that the Court had no jurisdiction to hear the application for retroactive child support for the two older children. Pentelechuk JA found that the motion judge had jurisdiction further to three bases. Pentelechuk JA found that a fair result required a finding that the *Henry* exception applied on the facts of this case. A flexible and purposive interpretation of the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.), resulted in the finding that the notice to disclose did not need to be filed. The father responded to the May 2016 letter and unfiled notice. The steps taken by the mother were thus adequate to trigger the Court's jurisdiction to hear her application with respect to all three children. Pentelechuk JA further found that

the father's blameworthy conduct in failing to provide income disclosure sufficed to trigger the Court's jurisdiction to hear the application, even if it was not brought while the children were still "children of the marriage". Lastly, Pentelechuk JA noted that the mother's 2017 application was a variation application that fell under s. 17(1) of the *Divorce Act*. Subsection 17(1) does not state that applications to retroactively vary child support cannot be brought after the children are no longer "children of the marriage". If parliament intended that children be "children of the marriage" at the time of both the original and variation application, it could have stated so. Feehan JA agreed only with the last reason given by Pentelechuk JA for finding that the motion judge had jurisdiction to hear the mother's application respecting all three children. The Court set aside the motion judge's decision. The mother was granted retroactive child support for all three children in accordance with the father's income.

Brear v. Brear, 2019 CFLG ¶27,584

Judge Erred in Finding No Entitlement to Non-Compensatory Spousal Support

Alberta Court of Appeal, November 25, 2019

The appellant wife and respondent husband met online in 2001. The husband travelled to Russia, where the wife lived, in 2002 and the parties commenced a relationship. In 2003, the husband sponsored the wife's immigration to Canada. The wife arrived in Canada in 2005 and the parties married the same year. At the time, the parties were in their 40s. There were no children of the marriage. The wife held degrees in radio physics and commerce from Russia. In Canada, she worked low-income jobs and attempted to upgrade her qualifications, but did not succeed in integrating herself into the economy. The parties separated in 2013. Post-separation, the wife spent 30 of the 48 months before the trial in Russia. At trial, the wife claimed retroactive spousal support from September 2013 and ongoing spousal support of $2,200 per month for five years. Prior to trial, the wife had been awarded $26,400 in spousal support and had exclusive possession of the matrimonial home for which the husband paid the carrying costs. The trial judge ordered an equalization of the family property and found no basis for awarding spousal support. The wife appealed.

The appeal was allowed in part. The Court found that there was a basis for some spousal support. When the parties decided to marry, it must have been evident to the husband that the wife's Russian qualifications would not be completely transferable in Canada and that she would face barriers due to her immigration work status and language issues. The trial judge's finding that the wife was not entitled to any need-based spousal support could not stand. The Court noted that there were evidentiary gaps, as the wife did not submit what her income and occupation were in Russia pre-marriage. The wife also undermined her claim by the choices she made post-separation, including her two-year absence from Canada during which she could have strived to become self-sufficient in Canada by working and studying. The Court found that the wife was entitled to a spousal support award of $800 per month for 12 months. This amount, together with the already received payments, fell into the appropriate range suggested by the Spousal Support Advisory Guidelines. The trial judge further erred in calculating the amount of the husband's date of marriage exemption for a property he owned and which he sold post-marriage, placing the proceeds in the jointly-owned matrimonial home. There was no evidence of the market value of the home on the date of marriage. The trial judge erred in finding the exemption was half the value of the equity at the time of sale in 2007. It was not reasonable for the trial judge to use the 2007 equity, which was $145,000. The appropriate approach was to assume the equity increased on a linear basis from the time of purchase to sale. Accordingly, on the date of marriage, the equity would have been $78,000, and the husband was entitled to half of it, being $39,000. The trial judge also erred in calculating the period of the husband's pension accrual from the date he commenced pensionable employment to the date of trial, rather than to the date of separation.

Lux v. Lux, 2019 CFLG ¶27,585

No Error in Refusing to Permit Primary Caregiver Parent to Relocate Children

Alberta Court of Appeal, December 13, 2019

The appellant mother and respondent father married in 2003 and separated in 2014. The parties had three children, aged eight, 10, and 12 years old. The mother relocated from Calgary to Grand Prairie in order to be with the father. Throughout their relationship, the parties lived in Grand Prairie. The parties agreed to joint custody in a separation

agreement. Pursuant to a 2016 order, the children's primary residence was with the mother, and the father had parenting time every second weekend. In February 2019, the father applied to vary the parenting arrangement to have shared parenting on a week-on/week-off basis. In April 2019, the mother cross-applied for an order permitting the children to relocate with her from Grand Prairie to Calgary. In July 2016, both the mother's and father's applications were dismissed. The chambers judge instead granted the father 60/40 residential care of the children. The mother appealed. The mother argued that the chambers judge erred in not giving sufficient regard to the children's relationship with her as primary caregiver.

The appeal was dismissed. The Court noted that the parties had agreed to joint custody, which clearly indicated that they intended to share equal rights to participate in decisions respecting the children. The Court distinguished case law relied on by the mother where the primary caregiver who sought the child's relocation also had sole custody and where the second parent had comparatively minimal parenting time. In the instant case, the father had, in addition to joint custody, significant residential care and parenting time. While the mother characterized herself as the primary caregiver, the time spent with the children was not the only determinant. The Court rejected the mother's argument that the chambers judge had placed her in the "double bind" situation prohibited by *Spencer v. Spencer*, 2005 ABCA 262. The judge had not opted for the status quo by improperly relying on the mother's admission that she would remain in Grand Prairie if the children were not permitted to relocate. The best interests of the children criterion was the only applicable criterion. The chambers judge had specifically acknowledged the bond between the children and mother, yet found that the impact of the relocation on the children's relationship with the father and the aggregate family structure would not be in the children's best interests. Among many factors, the chambers judge considered the views of the children report. The Court did not find that the children's views were given disproportionate weight. The children had been adamant that they needed to have as much contact as possible with each parent. It was not an error for the chambers judge to seriously consider this. The chambers judge did not err in law or commit any palpable and overriding error in finding that the possibility of significant disruptions in the children's lives due to the move favoured the children staying in Grande Prairie.

C.K.A. v. S.L.A., 2019 CFLG ¶27,586

Oral Property Agreement Binding Where Husband Did Not Elect to Terminate

British Columbia Supreme Court, October 1, 2019

The claimant husband and respondent wife separated in 2013 after a 20-year relationship. They had two children, aged 14 and 16. The parties remained living in the matrimonial home until the husband moved out in March 2015. Since separation, the wife paid all carrying costs on the home. In 2014, the parties orally agreed that the wife would pay the husband $30,000 in exchange for his interest in the family property, which primarily consisted of the matrimonial home. The parties assumed that the wife could qualify for a mortgage enabling her to take over the existing mortgage. By June 2015, the wife was still unable to obtain the financing. The parties borrowed $40,000 from the bank, of which the husband took $30,000. In July 2016, the husband's counsel sent a letter to the wife with a deadline of September 2016 for her to obtain financing and have the husband released from the mortgage. In November 2017, the wife arranged for financing, but required a separation agreement, which the husband did not provide. In September 2016, the husband commenced court proceedings, seeking a divorce only. In April 2019, he added a claim for equal division of the family property, calculated at its current value. Since the separation, the matrimonial home had appreciated. The husband took the position that the oral agreement respecting the $30,000 payment was no longer enforceable and that the parties had not agreed on the essential term of the timing of the payment.

The husband's claim was dismissed. The Court found that the parties had entered into a binding oral agreement under which the wife would pay the husband $30,000 for his interest in the home and release from the mortgage. In an agreement respecting property, the timing of payments is not necessarily an essential term, and in an agreement with no date specified, the inference may be that the payment is to be made within a "reasonable time". The Court found that when the husband accepted the $30,000 from the $40,000 loan, there was no longer an issue regarding the enforceability of the agreement. When the loan was taken out, the agreement was amended, and the timing of the payment was no longer tied to the wife obtaining refinancing. The husband's conduct in demanding, through his counsel's letter, a deadline of September 2016, undermined his argument that there was an agreement as to a formal deadline of September 2015. His actions were consistent with the agreement being in effect still, and with the implied

term that the release was to be obtained within a "reasonable time". If the wife's failure to meet the September 2016 deadline constituted a breach of contract, the husband had failed to elect to terminate the contract. The Court found that the agreement was still in effect when the wife sought to obtain refinancing in November 2017. The Court did not find it would be unfair to enforce the agreement. The evidence did not support that but for the wife's failure to obtain the discharge, the husband would have re-entered the real estate market sooner to benefit from increased property prices. Dividing the family property based on current values would result in a windfall to the husband, as the wife had paid for all house-related costs since March 2015. The Court ordered that the husband was to execute such documents as required to have the wife arrange for financing and obtain a release, which she was to do within 90 days.

Muller v. O'Flynn, 2019 CFLG ¶ 27,588

Court Has Jurisdiction to Order Repayment of Overpaid Support

British Columbia Supreme Court, October 17, 2019

The claimant husband and respondent wife married in 1998, separated in 2007, and divorced in 2010. They had one child, born in 2002. The child had developmental delays and lived primarily with the wife. The husband was a pharmacist who operated a pharmacy. Under a 2013 consent order, he was required to pay child support of $4,000 per month, an additional $1,000 for a nanny, and spousal support of $8,000 per month. In 2019, the husband established a material change in circumstances allowing for a variation of support (see 2019 BCSC 424, 2019 CFLG ¶ 27,534). The Court ordered that the husband pay $1,434 in child support effective December 2014 and spousal support of $3,600, based on the higher end of the Spousal Support Advisory Guidelines. The husband was to continue paying $1,000 per month for the child's nanny. The husband sought the repayment of the $363,570 support overpayment from the wife. The wife took the position that the Court did not have jurisdiction to order a repayment of support. She brought an application for an order that the claimed overpayment be either cancelled, reduced, or stayed on the basis of hardship, and for an order to extend the duration of the spousal support obligation beyond its end date of January 30, 2019.

The application was dismissed. None of the cases relied on by the wife expressly discussed the jurisdiction to order a repayment of support. The Court found, however, that there was a broad acceptance, or assumption, in the case law that such orders could be made. The Court found that the authority for a repayment order lies in s. 17 of the *Divorce Act*, RSC 1985, c. 3 (2nd Supp), which provides courts with the power to vary support orders both prospectively and retroactively. The jurisdiction to order a repayment of overpaid support is concomitant to the power to retroactively decrease support. If the wife's position was accepted, in light of s. 17, this would mean that courts may find that a payor has a right to decreased retroactive support, but cannot order a remedy, which would be a result that is inconsistent with the purposive approach to statutory interpretation. The Court found that it also has authority to order a repayment of support pursuant to its inherent jurisdiction to effect a just and equitable result. When making a repayment order, the *D.B.S. v. S.R.G.*, 2006 SCC 37, 2006 CFLG ¶ 26,140, factors are to be taken into account. The Court did not find that the wife established hardship. The wife had a net worth of $6.8 million, and there was no reason she could not liquidate one of her four properties. There was no basis for cancelling or reducing the amount of overpaid support. The wife, further, did not establish a material change in circumstances allowing for a variation of spousal support. The evidence did not support that the child's condition had worsened in a way unknown in 2013, leaving the wife less able to work. The wife was not entitled to an extension of spousal support.

Moazzen-Ahmadi v. Ahmadi-Far, 2019 CFLG ¶ 27,589

Court Erred in Application of Summary Judgment Principles to Child Protection Matter

Ontario Court of Appeal, October 25, 2019

The appellant was the mother of three children, aged three, four, and nine. The oldest child was apprehended by the Toronto Children's Aid Society soon after birth in 2010. In December 2011, the Court found the child to be in need of protection under the *Child and Family Services Act*, RSO 1990, c. C.11 (the "CFSA"), due to a risk of physical harm and sexual molestation. The eldest child was returned to the mother's care in 2012. In December 2015, the Halton Children's Aid Society obtained a temporary order placing the two older children under their supervision. The respondent Children's

Aid Society of the Region of Peel ("Peel CAS") apprehended the children and placed them in its care with supervised access to the mother in May 2016. After the third child was born in June 2016, he was also apprehended and placed in a foster home. In May 2017, Peel CAS applied to have the three children made Crown wards without access. In January 2018, relying on the CFSA, the motion judge granted Peel CAS summary judgment after finding numerous child-protection issues, with no signs of improvement and a pattern of neglect and harm by omission by the mother. The motion judge refused to grant the mother access, taking judicial notice of the fact that many or most adoptive parents would not proceed with an adoption if there was an access order with a birth parent. The Ontario Superior Court affirmed the decision in March 2019, also under the CFSA. The Superior Court found that the motion judge erred in taking judicial notice of the fact respecting adoption prospects, but ultimately held that this factual finding was justified having regard to the evidence and "common sense". The mother appealed. The Court allowed weekly access visits pending the disposition of the appeal.

The appeal was allowed in part. The Court found that the Superior Court erred in applying the CFSA and not the *Child, Youth and Family Services Act, 2017*, SO 2017, c. 14, Sched. 1 (the "CYFSA"), which had replaced the CFSA at the time the decision was made. The Court further erred in relying on the Divisional Court's decision in *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2018 ONSC 2783, for the principles of summary judgment in child protection matters, as that decision was overturned by the Court of Appeal. The Court of Appeal held that the Divisional Court ignored case law requiring that summary judgment be granted only "when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment". The Divisional Court also erred in stating that a highly cautionary approach to summary judgment in child protection cases is no longer warranted. The Court found that the motion judge's factual findings confirmed that there was no genuine issue requiring a trial that all three children were likely to suffer physical harm due to the mother's inability to care, provide for, protect, and supervise them, and that there was a substantial risk to the children if they were returned to the mother. Accordingly, the Court found that the children should be placed in extended society care, pursuant to the CYFSA. The Superior Court erred in finding that an access order was inappropriate in this case. The Court erred in placing the onus on the mother to establish that there was a genuine issue requiring a trial as to whether there should be an access order. The Court also erred in not applying the CYFSA, under which the analysis respecting access is governed by the best interests of the child test. While the Superior Court correctly identified the error with the motion judge's taking of judicial notice, it erred in its own analysis of the issue of the children's adoption prospects vis-à-vis the mother's access. The evidence on the motion did not suggest that access would undermine adoption prospects for these particular children. It was also an error for the Superior Court to rely on "common sense" and "informed experience" to arrive at its finding, which could not meet the burden of s. 105(5) of the CYFSA, which requires looking at the best interests of the particular children to whom access is sought. The Court found that the evidence suggested that the children had strong emotional ties to the mother and access was in their best interests. The issue of the nature and extent of the access was remitted to the Ontario Court of Justice.

L.M. v. Peel Children's Aid Society, 2020 CFLG ¶27,594

Judge Erred in Finding Material Change and Granting Interim Mobility Order

Saskatchewan Court of Appeal, November 26, 2019

The appellant father and respondent mother were married in 2002 and separated in 2016. They had three children. During the marriage, the parties lived in Estevan, Saskatchewan, and the mother was a stay-at-home parent. In an October 2017 fiat, the mother was granted exclusive possession of the family home and primary residence of the children, with "reasonable parenting time" for the father. A November 2017 fiat ordered that the father have parenting time every second weekend and dismissed the mother's interim application for an order permitting her to relocate the children to Tantallon, Saskatchewan, finding there were no compelling circumstances for the children's relocation. The fiat also ordered that the family home be listed for sale. In June 2019, the mother applied for an interim order permitting her to relocate to the Moosomin area. She deposed that the family home was subject to an order *nisi* for judicial sale and she would be required to vacate it in the near future, that her financial situation was dire, that the children would be required to move schools if they went to live in low-income housing, that her family in the Moosomin area was willing to provide her and the children with free accommodation and a vehicle, and that she believed there were better job prospects there. The chambers judge found that the mother's deteriorating financial situation constituted a material change in circumstances. Finding that it was in the children's best interests to continue to live in the mother's primary care, the judge permitted the move. The father appealed.

The appeal was allowed. Pursuant to case law, significant caution is to be exercised in interim mobility applications, as an interim mobility order can create a new normal affecting the final result of a custody and access matter. Further, caution is to be exercised when making what may become a final decision on relocation where there is contradictory, inconsistent, or limited evidence. The Court found that the mother had failed to meet the evidentiary burden of establishing that a material change in the condition, means, needs, or other circumstances of the children had occurred since the November 2017 fiat, and that it would be in the children's best interests to relocate to the Moosomin area. As the mother had not updated her financial statement since it was relied on for the November 2017 fiat, the Court did not find that the evidence supported the conclusion that the mother's financial situation was such that it constituted a material change. At the time of the November 2017 fiat, the mother's only income was child and spousal support, which remained the case when the interim mobility application was granted. The unskilled labour market in Estevan was equally dismal in 2017 as it was in 2019. The parties had yet to divided family property in both 2017 and 2019. The sale of the family home could not amount to a material change, as the parties were aware of the sale since the November 2017 fiat, which ordered the sale. One clear change in the mother's situation was that she no longer had a serviceable vehicle, yet the evidence indicated that the children took the bus to school and had no extracurricular activities. The Court concluded that the chambers judge erred in finding a material change. Even if the material change was established, the evidence fell short of establishing "compelling circumstances" for allowing relocation on an interim basis.

Thievin v. Thievin, 2020 CFLG ¶ 27,600

OTHER NEWS

Ontario

Continuing Legal Education

On February 21, 2020, the Law Society of Ontario presents Family Law Refresher 2020. The program's presenters will discuss the foundations of custody, access, support, and property issues, and the latest trends and cases. Practical advice on negotiating and drafting agreements and alternative dispute resolution options will also be given. For more information or to register, visit: https://store.lso.ca/family-law-refresher-2020.

On March 26 and 27, 2020, the Law Society of Ontario presents the 14th Family Law Summit, chaired by Kelly D. Jordan, C.S., of Kelly D. Jordan Family Law Firm, and Mary-Jo Maur, Assistant Professor at the Faculty of Law at Queen's University. The two-day program offers a comprehensive analysis of the latest case law and trends, presented by lawyers, judges, and experts, on a diverse range of topics. For more information or to register, visit: https://store.lso.ca/14th-family-law-summit.

Saskatchewan

Mandatory Dispute Resolution

As of January 1, 2020, Saskatchewan has implemented mandatory early family dispute resolution in separation and divorce proceedings, starting in Prince Edward County. Most family law matters will be required to go through the dispute resolution process before moving on to court proceedings, with exceptions being made for cases that involve interpersonal violence, child abduction, and other extraordinary circumstances. Options for family dispute resolution include collaborative law services, family law arbitration, family mediation, and parent coordination. Low-income options are available if needed.

CANADIAN FAMILY LAW MATTERS

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