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The Law Isn't Always Fair

Schreyer v. Schreyer, 2009 MBCA 84 deals with the intersection of bankruptcy and family law, specifically, the impact of one spouse's post-separation bankruptcy on the family property equalization process. Both parties appealed the court order confirming the accounting and valuation prepared by the master. The court rejected the wife's argument that the husband should not have been credited for debts discharged by bankruptcy when valuing his net equity for purposes of equalization. In addition, they found the equalization payment owed by the husband to be "a debt like any other and, unless exempt under s. 178(1) of the BIA" extinguished by the bankruptcy discharge. The court acknowledged the apparent unfairness of this result at para. 129:

> From the wife's perspective, the unfortunate and unfair circumstances here are that the husband's assets were exempt assets and therefore were not shareable amongst his creditors, whereas his debts, including the wife's equalization claim, were extinguished upon his discharge from bankruptcy. In the result, he is left with the farm property and no unsecured debt and her entitlement to an equalization payment is extinguished by reason of his bankruptcy. This, however, is the result mandated by the clear wording and intent of the relevant legislation.

Settlement Must Be Clear to Enforce

Two recent decisions of the Family Division court, *Poste v. Mitchell-Poste*, 2009 MBQB 201

and
Anderson v. Bernhard, 2009 MBQB 208, involve motions under Queen's Bench Rule 49 for judgment based upon alleged settlements. While the court confirms that the s.49.09 procedure can be used in family matters, it also notes that the Court of Appeal has made it clear that "proceedings in the Family Division do not, in the ordinary course of things lend themselves to this procedure." In both cases the court dismisses the motion to enforce. In *Poste*, the moving party failed to meet the onus to establish a clear settlement and the details of that settlement. The court found it did not have jurisdiction to enforce certain terms which had never been plead or for which there was insufficient evidence, and that selective enforcement is not possible. In *Anderson*, the petitioner sought to enforce a nine-year-old offer to settle that was to "expire on the date of the commencement of trial." The court rejected the respondent's arguments that the offer had been rejected or that it had expired because a "trial" (a hearing for directions before a master) had commenced. However, although the respondent had never formally withdrawn the offer, neither had a binding agreement been reached before an essential term of the offer could no longer be fulfilled, and this was fatal to the motion to enforce.

Calculating Spousal Support

Jenkins v. Jenkins, 2009 MBQB 189 is the follow-up decision to *Jenkins v. Jenkins*, 2008 MBQB 271, where the court overrode a pre-nuptial agreement waiving spousal support. In determining quantum of support the court rejects the husband's argument that any income derived from investments which were released under the agreement cannot be considered in determining his support obligations. The court finds that the parties did not intend to "exclude those assets from consideration when measuring the means of either party to pay spousal support to the other..." Alternatively, the court concludes that "there is no principled or logical reason to distinguish this case (where income is derived from RRIF and/or from an unregistered fund unequalized under the terms of an agreement, but where the waiver of spousal support in that agreement has been set aside by court order) from *Cymbalisty*." In *Cymbalisty v. Cymbalisty,* 2003 MBCA 138 the Manitoba Court of Appeal followed the finding in *Boston v. Boston*, 2001 S.C.C. 43 that there was "no proscription against consideration of previously equalized assets in assessing the means of the payor spouse."

A Judge's Take on Collaborative Law

Collaborative law lawyers will be interested in the court's comments on the collaborative law process and players in *Webb v. Birkett*, 2009 ABQB 239, a solicitor's negligence action. Noting how important context is in determining whether a breach of duty occurred, the court conducts an extensive review of collaborative law practice starting at para. 51. It finds that

> the role of the lawyers is to develop the process and the role of the parties is to take ownership of the process, gather their own information, and actively and fully participate in assessing the quality of that information...The clients are educated and empowered by the lawyers to make decisions affecting the outcome. However, the CFL lawyer still has the fundamental responsibility to provide professional legal advice to their client.

In this case, the court found that the client had received sufficient advice to make an informed decision regarding her entitlement to spousal support and property division and the negligence claim was dismissed.

Child Protection Trumps Privacy Concerns

To facilitate wider circulation of an important oral decision made last January, the court recently released Justice Thomson's reasons in written form: *Peguis CFS v. C.S. and M.S.*, 2009 MBQB 220. The case concerns a motion by Peguis Child and Family Services under Queen's Bench Rule 30.10 for production of third party documents and criminal records directly related to an agency apprehension/placement of four children. The court rejects the Winnipeg Police

Service's argument that limited disclosure is necessary to protect the privacy rights and interests of police witnesses. Recognizing the paramount consideration of protecting children, the court orders unredacted disclosure and production.

Version 3 of Standard Clauses Released

Version 3 of the mandatory standard clauses for family division orders is now available for download on the Manitoba Justice website, as announced in a Court of Queen's Bench Notice dated August 2009.

Spousal Support Resources

University of Toronto Faculty of Law professor Carol Rogerson, a co-author of the Spousal Support Advisory Guidelines report, maintains a webpage collecting and linking the main documents relating to this project as well as other material on the law of spousal support.

The *Law Times* article *Family Law: B.C. court throws curveball on spousal support* discusses the import of the B.C. Court of Appeal decision in *Bell v. Bell*, 2009 BCCA 280. The appeal court overturned a lower court decision cancelling a $10,000 per month spousal support consent order and substituted a reduced award of $5,000 per month.

Family Court Wars

The September 2009 edition of *The Family Way*, the CBA Family Law section newsletter edited by local lawyer Anu Osborne, is now available online. Among other articles, the newsletter contains Anu's review of *Tug of War: A Judge's Verdict of Separation, Custody Battles and the Bitter Realities of Family Court*, a new book on the impact and consequences of family court battles by Mr. Justice Harvey Brownstone of the North Toronto Family Court. Anu suggests that the book should be required reading for family law practitioners and their clients. For a taste of the book's contents see *Family Court: Do Your Clients Know What They're Getting Into?*, an excerpt from chapter 1 of the book posted July 2009 on CBA Practice Link.

Sometimes settlement is not possible despite your best efforts. In those cases, preparation is the key to success at trial. The article *Conducting an Effective Family Law Trial-Techniques and Tools for Efficient Trial Preparation* by Douglas M. King, posted July 2009 on Practice Points, is a practical and succinct roadmap (B.C. based but still useful) for trial preparation.