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Onus on Applicant to Establish Undue Hardship: MBQB

In [*Zivot v. Tobey*](#), 2009 MBQB 269 the court dismisses the petitioner's motion for financial disclosure to support his bid to pay less than the guideline amount of child support due to undue hardship. The court found that to succeed under s.10 of the [*Child Support Guidelines*](#) the petitioner must first establish, at least on a *prima facie* basis, that he will suffer undue hardship as a consequence of paying table child support. Only then will the court consider the respective standards of living of the parties. Given the petitioner's \$400,000 income and his failure to exercise even the minimum periods of parenting time agreed to by the parties he did not meet the undue hardship test.

Distinguishing Volume from Weight

In [*Dickson v. Dickson*](#), 2009 MBQB 274, a complicated trial involving income determination and imputation to establish spousal and child support obligations and property issues, Justice Yard expresses his frustration with the inordinate volume of written materials prepared and filed in evidence. Agreeing with Justice Scollin that being able to distinguish volume from weight is a measure of good advocacy, he says:

In my view, counsel have a duty to edit and organize the material and to marshal the available evidence, presenting to court only that evidence which can reasonably be seen as cogent and useful in the fact-finding exercise which a trial represents. The practice of tendering every piece of paper produced or discovered in the months and years leading up to the hearing, no matter how remotely relevant to the issues to be determined at trial is to be abhorred. (para.138)

Capacity to Separate a Lower Standard

The Supreme Court of Canada recently denied leave to appeal the decision in [A.B. v. C.D.](#), 2009 BCCA 200, which held that the standard for capacity to marry, separate and divorce is a lower standard than the standard of mental capacity to manage affairs and instruct counsel. The husband argued that the petitioner wife was delusional and therefore incapable of forming the requisite intention to live separate and apart. The court found:

disordered or delusional thinking which may contribute to an individual's intention to live separate and apart, does not diminish that individual's capacity to form that intention, provided it does not reach the level of incapacity that interferes with the ability to manage his or her own affairs and instruct counsel.

The following article discusses the decision:

[Intention and \(In\)Capacity to Live Separate and Apart in C.D. v. A.B.](#) by Daniel Del Gobbo, posted October 27, 2009 on The Court.

How Parent Alienation Cases May Change the Best Interests Test

The article [How to Assess the "Best Interests" of Pathologically Alienated Children](#), by Daniel Del Gobbo, explores the complicated issue of how courts should determine the best interests and views of children who have suffered parent alienation syndrome. Several Ontario cases have dealt with this issue, including the controversial [L.\(A.G.\) v. D.\(K.B.\)](#), 93 O.R. (3d) 409, in which the judge removed three girls from the custody of their mother for deprogramming in a US treatment centre. The author concludes by suggesting a new "best interests" framework for parent alienation cases, the individualistic approach outlined by the Supreme Court of Canada in [A.C. v. Manitoba \(Director of Child and Family Services\)](#), 2009 SCC 30.

Update on Common Law Defences in Family Law

Common law defences to contract may be used to challenge a family law agreement even where statutory review or variation is not possible. In ["Challenging the Deal"-Applying the Common Law Defences to Family Law Agreements](#), recently posted on BC CLE's [Practice Points](#), authors Schuman and Desilets discuss the common law defences to family law contracts (unconscionability, mistake, uncertainty, duress and undue influence) and highlight recent case law developments (mainly in B.C.) on the topic.

2010 Calendar for Children Experiencing Separation or Divorce

[The Department of Justice Canada](#) has created a [2010 calendar](#) for children designed to accompany the booklet titled [What Happens Next?](#) The downloadable calendar encourages children whose parents are separating or divorcing to keep track of the events in their new routines.

Upcoming Family Law Programs

The Family Law section of the Manitoba Bar Association is presenting the program ["An Honourable Profession?"](#) with Madam Justice Guertin-Riley on November 30, 2009 starting at 12:00 noon at the Law Society of Manitoba classroom. Contact the Manitoba Bar Association for further details or to register.

Be sure to register soon for ['Til Death Do Us Part and Beyond](#), a full day program examining the issues arising at the intersection of family law and death. The program, jointly sponsored by the Law Society, Q.B. Family Division Judges, and the MBA, will take place on Friday, March 5, 2010 at the Radisson Hotel, Winnipeg.

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