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In This Issue

Expungement Appeal a Wasteful Exercise: MBQB

Lawyer's Negligence Limited: ONCA

ISO Review: MBQB

Care and Control Reversed in Contempt Proceeding: MBQB

Suspicious Underemployment and Support Obligations

Supreme Court to Hear Schreyer Appeal

Proposed Family Law Changes Introduced

Go With Your Gut

Upcoming Programs

Expungement Appeal a Wasteful Exercise: MBQB

The court had harsh words regarding the unsuccessful appeal of a Master's order expunging an entire affidavit in [Reyher v. Reyher](#), 2010 MBQB 53. In response to the suggestion that the Master erred by failing to undertake a line-by-line-by-line analysis of the impugned affidavit, and by failing to express discrete reasons for the expungement of each sentence or passage, the court said:

The court's duty in ensuring procedural fairness does not extend to or encompass the effective editing of the affidavit prepared by counsel and executed by his or her client, where adherence to the most basic principles of drafting is casual at best and the court rules are substantially ignored. (para 32)

And, regarding the submission that the affidavit should be admitted because a court making a decision concerning children should hear all available evidence, the court said:

In my view, the determination of interim motions should not involve an evidentiary free for all, whatever the issues may be; and the bar of admissibility ought not to be easily or lightly lowered because an issue before the court relates to the best interests of a child.

The benefits of such bar-lowering are almost invariably illusory, as the relevance, the reliability and the probative value of the proffered evidence descends. (paras.37 and 38)

The court fixed costs for the "wasteful exercise" at \$3,000.

Lawyer's Negligence Limited: ONCA

The Ontario Court of Appeal has issued its reasons in [Carr v. Parlee](#), 2010 ONCA 254, a ruling Ontario family law lawyers were anticipating because it concerns a negligence claim against a lawyer by a former client. The plaintiff alleged "that she was browbeaten into an improvident settlement by her former solicitor, who she claim(ed) was also negligent in his evaluation of the quantum of spousal support to which she was entitled and in failing to make certain claims for relief on her behalf." The lower court granted the lawyer leave to bring third party proceedings against the plaintiff's former husband who, the lawyer alleged, had misrepresented his income and had the primary responsibility to support the plaintiff. The appeal court upheld the trial court finding that the lawyer's negligence and damages were limited to two areas of admitted negligence and did not permeate the whole of the settlement. It found that the trial judge erred, however, in restricting the notional commencement date of spousal support and ordered a further six months of support.

ISO Review: MBQB

In [Lei v. Kwan](#), 2010 MBQB 60 the court dismissed the petitioner's application for a provisional order of support against her common law partner, a resident of the province of Quebec where the parties resided for the majority of their relationship. In Quebec unmarried partners in conjugal relationships do not have support obligations to one another unless they contract for same or enter into a civil union. After an extensive review of the common-law support and enforcement legislation and jurisdictional issues, the court found that [The Inter-jurisdictional Support Orders Act](#), C.C.S.M. c. I60 does not create substantive rights and obligations against residents of jurisdictions where none exist.

Care and Control Reversed in Contempt Proceeding: MBQB

Wilful and persistent breach of court orders regarding the care, control, and schooling of the parties' daughter, and the mother's refusal to participate in court proceedings, left the court no alternative but to order a change in care and control to the father with peace officer assistance in [Wong v. Barnard](#), 2010 MBQB 64. Contempt proceedings against the mother were adjourned and she was ordered to attend at the continuation.

Suspicious Underemployment and Support Obligations

Unexplained underemployment or substantially reduced income will not eliminate support obligations according to the court in two recent Manitoba decisions. The court imputed an annual income of \$75,000 to the respondent father in [Senger v. Rawana](#), 2010 MBQB 57. Despite previously earning a significant income as a computer engineer, he claimed to earn under \$10,000 as a part time sales associate and provided no information to the court to justify the reduction. In [Borland v. Borland](#), 2010 MBQB 78, the court made a \$1500 per month interim spousal support order despite impoverishment claims by the husband, an unemployed former business owner. The court had these comments about his financial situation:

For a person with such extensive experience in the entrepreneurial world Mr. Borland's reliance on unemployment as the reason he should not be ordered to support his wife is disingenuous. At the date he separated from her he knew she was wholly dependent upon him. He had and continues to have a legal obligation to help her. Mr. Borland deliberately used funds available to him since separation for purposes other than a contribution to the support of his dependent spouse. He has defaulted on the written agreement and thereby on his promise to assist her. He, more than she, has the greater capacity to earn an

income. The Court is not convinced that he has taken reasonable steps to find employment. His experience exceeds his wife's in securing employment. (para. 26)

Supreme Court to Hear Schreyer Appeal

The Supreme Court will hear the appeal of the Manitoba Court of Appeal decision in [Schreyer v. Schreyer](#), 2009 MBCA 84, the August 2009 case concerning the impact of one spouse's post-separation bankruptcy on the family property equalization process. As reported in our September eLaw, the Court of Appeal noted how unfair and unfortunate the circumstances of the equalization were for the wife, but found the result to be "mandated by the clear wording and intent of the relevant legislation."

Proposed Family Law Changes Introduced

The Manitoba government introduced new legislation affecting domestic violence and child custody proceedings on April 12, 2010. [Bill 19](#), *The Protection from Domestic Violence and Best Interests of Children Act (Family Law Statutes Amended)*, proposes changes to *The Child Custody Enforcement Act*, *The Family Maintenance Act* and *The Domestic Violence and Stalking Act*. Among other things, the bill aims to enhance and refine protections for victims of domestic violence and sets out criteria for the court to consider in determining a child's best interests in custody and access cases.

Go With Your Gut

Lawyers and courts are ignoring the Chapter 12 exceptions to the Spousal Support Advisory Guidelines according to Rollie Thompson, co-author of the guidelines and author of the *Lawyers Weekly* article [Why are the exceptions to the support guidelines ignored?](#) His review of last year's spousal support decisions turned up only three cases in which the exceptions were mentioned, which is surprising given the high number of atypical or unusual cases. He suggests lawyers review Chapter 12 every time their gut instinct tells them that the formula outcomes don't seem right.

Upcoming Programs

The Honourable Madam Justices Diamond and MacPhail will speak on [Hague Convention Applications and Judicial Communication](#) at a Family Law section lunch program on April 28, 2010 at the Law Society of Manitoba classroom. For further information or to RSVP, contact the [Manitoba Bar Association](#).

The Northern Bar Association is presenting the CPD program [Tough Procedural Issues in the North in Family Law Matters](#) at their annual meeting on June 11, 2010 in Flin Flon, Manitoba.

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