



## eLaw - Family Law Update

June 2010 - No. 44

ISSN 1916-3924

eLaw Family Law Update will not be published in July and August.  
Watch for the next issue in your Inbox in September 2010.

### In This Issue

Psychological Assessments Must Not Usurp Court's Decision Making Duty:  
MBQB

Equality and Fairness Not Always Synonymous: MBQB

Unjust Enrichment Analysis: BCCA

Final Pension Benefits Act Changes in Force

Fraud Scams Close to Home

TV Shows and Phone Apps: How the Internet is Filling a Legal Services Gap

## Psychological Assessments Must Not Usurp Court's Decision Making Duty: MBQB

The court refuses the father's motion to vary "one of the most detailed Orders" the judge has ever seen in [Burke v. Moore](#), 2010 MBQB 124, a case where the parties have been fighting for years over care and control of their single child. The father sought to vary the 25 page variation order to require that the parties, their daughter, the wife's parents and the husband's spouse all undergo a psychological assessment. Noting that the child had already been subjected to two intrusive psychological assessments in her short life, the court refused to order another, finding:

Psychological assessments should not be ordered in every situation of conflict between parents regarding their child. They should certainly not be ordered where there is a wealth of available evidence, all of which could be put to a Judge at trial and cross-examined upon. Recommendations made in an assessment are only statements of opinion. Some may be accepted by the trier of fact and some may be rejected, all in the context of the totality of the other evidence. Assessments and recommendations must not usurp the duty and responsibility of the Court to make necessary decisions in a child's best interests. (para.18)

## Equality and Fairness Not Always Synonymous: MBQB

The court considers two issues in [Melnyk v. Melnyk](#), 2010 MBQB 121: the date the parties last cohabited under s.16 of *The Family Property Act* and the validity of a hastily signed pre-nuptial agreement. On the first issue the court found "no clear and convincing evidence of the parties living separate and apart under the same roof," even though the wife had moved into a

basement apartment in the house eight months before she left the marriage to live in a separate residence owned by a male friend. "A discordant and disrupted marriage over many years is not the equivalent of a separation or cessation of cohabitation" (para. 48) and the wife's alleged affair did not create an earlier separation anymore than a previous affair by the husband did. On the second issue, the court stressed that "the purpose of a pre-nuptial agreement or marriage contract is to avoid the statutory regime which would otherwise apply. Such agreements are specifically authorized and given effect to by the provisions of *The Family Property Act*. Had the Manitoba legislature intended such agreements to be measured against a defined or undefined standard of fairness it would have so provided in the statute." (para. 64) Applying the traditional common law threshold for considering the validity of a pre-nuptial agreement the court found insufficient evidence of either duress or unconscionability and declined to invalidate the agreement.

## Unjust Enrichment Analysis: BCCA

The British Columbia Court of Appeal has taken a new approach to reciprocal unjust enrichment in [Wilson v. Fotsch](#), 2010 BCCA 226. Noting that the courts "have found ways to off-set reciprocal enrichments for many years with unpredictable and at times inconsistent results," the majority decision in *Wilson* sets out a framework for analysing unjust enrichment claims derived from [Garland v. Consumers' Gas Co.](#), 2004 SCC 25, a commercial class action case. In *Garland*, the Supreme Court explained that mutual enrichments should be considered at the juristic reason stage for the limited purpose of assessing the parties' legitimate expectations; otherwise, they should be considered at the remedy stage. This two step approach differs from the line of cases followed in [Kerr v. Baranow](#), 2009 BCCA 111, which suggests that, in relationships where there are reciprocal contributions, benefits received by the plaintiff from the defendant can constitute a juristic reason for the defendant to retain his or her enrichment. This issue will likely be resolved soon, when the Supreme Court of Canada decides *Kerr* and its companion case [Vanasse v. Seguin](#), 2009 ONCA 595, heard last April.

## Final ***Pension Benefits Act*** Changes in Force

All remaining provisions of [The Pension Benefits Amendment Act](#) are in force as of May 31, 2010. Among other things, the amendments will entitle a member's surviving spouse to a pension as pre-retirement death benefits, limit the ability to waive or contract out of the requirements of the Act, harmonize joint pension requirements with those of other jurisdictions and provide new triggers for the division of a pension or pension credits between separated spouses.

## Fraud Scams Close to Home

Both the Law Society of Saskatchewan and Ontario's LAWPRO have issued fraud alerts to their members in the last week concerning what appears to be an identical collaborative family law agreement scam. Two Saskatchewan lawyers were targeted in May, as described in this [fraud alert](#), which includes copies of the documents, correspondence and fake cheque used in the scam. Ontario lawyers have been reporting a very similar scam since last April, prompting this [alert](#) on June 17, 2010 detailing the elements of the scam and advising of the steps to take in such circumstances.

Should you ever suspect fraud and need to verify the identity or status of an out-of-province lawyer go to [Provincial, Territorial and State Lawyer Licensing Databases](#), a recent article by practicePRO Director Dan Pinnington. It provides links to the lawyer licensing databases of all Canadian provinces and territories and a link to the LLRX article [A Compilation of State Lawyer Licensing Databases](#), which does the same for 43 state databases.

## TV Shows and Phone Apps: How the Internet is Filling a Legal Services Gap

The Slaw article [Legal Problems in Ontario? You're Not Alone](#), by Omar Ha-Redeye, discusses a recent Ontario [study](#) confirming that most low income earners face significant access to justice hurdles, especially those with family law problems. The study predicts that the number of self-represented litigants will continue to grow, and so too will the use of the internet as a source of legal information to fill the legal services gap. It points to existing services like [CLEOnet](#) and [Law Help Ontario](#), which provide online information and resources such as document assembly programs for court forms.

Some judges and lawyers are making the best of this trend. Ontario Family Court Judge Harvey Brownstone has [launched](#) a new television show, [Family Matters](#), to educate the public about family law in Canada. And, a family law lawyer from Dallas has teamed up with an app developer to create a series of do-it-yourself divorce apps for the iPhone. [Divorce Cost & Prep](#) helps would-be divorcees calculate how much a divorce actually costs and [Estate Divider](#) creates an inventory of assets and liabilities and calculates property division.

*The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.*