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Change in Circumstance a Prerequisite For Variation: MBQB

In [*Payjack v. Striowski*](#), 2010 MBQB 192 the court considers the impact of a then pending change to s.46 of *The Family Maintenance Act*, which was passed a few hours after the motion was heard on June 17, 2010. The court declined to review the terms of an interim consent order made six weeks earlier, finding no change in circumstances and therefore no basis on which to vary the quantum of support payable. The court found that jurisdiction to vary the order came not from the order itself but from s.45 of *The Family Maintenance Act*, and commented as follows on the s.46 amendment:

Section 45 of *The Family Maintenance Act*, the section providing for reviews, contains the provision that the Court may, upon a review, vary or discharge an existing Order. Section 46 specifies that upon such a review and subsequent variation or discharge the Court must determine it fit and just to do so. The amendment now includes a qualifying feature which is that the determination of when it is fit and just to review and vary requires consideration of a change in circumstance. While the amendment was not in effect (by a few hours) when this motion was heard and therefore the Court is not required to consider a change in circumstance, it is inherent in the "fit and just" test that something must justify a change to the existing Court Order before such change should be made.

Sanctioning "Reprehensible, scandalous and outrageous conduct": MBQB

A request for solicitor-client costs was successful in one recent case and not in another:

In [Dickson v. Dickson](#), 2010 MBQB 164, the court ordered solicitor-client costs in the amount of \$180,000 (reduced from the original calculation of \$260,997.06) against a husband who misled the court and avoided disclosure obligations. The court concluded:

Litigation matters before the courts are serious matters, usually involving significant expense and are to be taken seriously by litigants. Litigation inevitably requires a series of litigation choices around positions, strategy and the conduct of the case. Those who choose to litigate disingenuously, to mislead opposite parties and the court, and to avoid disclosure obligations run the risk of very substantial costs being awarded against them. Regrettably that has been the case here. (para.38)

In [McLachlan v. McLachlan](#), 2009 MBQB 189, however, the court declined to order solicitor-client costs against a wife who had failed to provide updated financial information that would have eliminated the husband's obligation to pay child support over a three year period. The wife was ordered to pay back the excess child support and fined \$750, but, mindful of the economic circumstances of the parties and the fact that the total amount of overpayment, fine and costs totalled just over the small claims jurisdictional limit (where costs are limited to a counsel fee of \$100 in most cases), the court ordered costs on a Class III basis.

Partition and Sale: MBQB

[Penniston v. Penniston](#), 2010 MBQB 163 and [Lane v. Lane](#), 2010 MBQB 165 are recent cases involving partition and sale of jointly owned property. In *Lane*, the court grants the husband's application for sale of the parties' cottage, rejecting the wife's arguments that losing the property would be oppressive to her and to the parties' daughter, and that the husband's conduct disentitled him to the order. In *Penniston*, the issues were who ought to have conduct of the sale and whether the husband's share of the proceeds of the sale should be withheld as security for an as yet to be determined equalization payment. The court granted the petitioner conduct of the sale, but denied her request for posting of security given the weak evidence as to entitlement and quantum due, and as to any previous acts or omissions of the respondent demonstrating avoidance of legal obligations to the petitioner.

New Legislation

[Bill 19](#), *The Protection from Domestic Violence and Best Interests of Children Act (Family Law Statutes Amended)*, S.M. 2010, c. 17, received royal assent June 17, 2010 and will come into force October 17, 2010. Among other things, it enhances 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. The bill amends the following acts: *The Child Custody Enforcement Act*, *The Family Maintenance Act* and *The Domestic Violence and Stalking Act*.

[Bill 30](#), *The Strengthened Enforcement of Family Support Payments and Miscellaneous Amendments Act (Various Acts Amended)*, S.M. 2010, c. 28, also received royal assent June 17, 2010. Most of the maintenance enforcement-related amendments do not come into force until a date to be fixed by proclamation, but provisions concerning genetic testing ([s.2](#)), prospective/retroactive child support orders ([s.3](#)), s.46 variation clarification ([s.7](#)), reporting evaluation refusals ([s.28](#)), and repeal of previous unproclaimed amendments ([s.31](#)) came into force on royal assent.

Embracing Change

Despite what seems like unprecedented change in the laws governing families over the last 25 years, more needs to be done say the authors of a Law Commission of Ontario report and the legal experts quoted in several recent publications:

Slaw has posted links to the LCO report on the state of family law, [Voices from a Broken Family Justice System: Sharing Consultations Results](#) which, according to this recent [Globe and Mail article](#) slams the legal system for "draining parents' bank accounts, ignoring expert advice in favour of simplistic solutions and leaving children out of the process."

The *Canadian Lawyer* article [Four pillars to resurrect a broken system](#), outlines the family law reforms recently introduced in Ontario. The reforms are framed in "four pillars": information

programs and services, triage, alternatives to court, and streamlined court process.

A debate on the effectiveness of such reforms has been ignited by recent remarks by Ontario Chief Justice Warren Winkler questioning the effectiveness of incremental change and proposing a complete overhaul of the province's family law system. His argument in favour of a mandatory alternative dispute resolution system which would control access to the courts is receiving mixed reviews according to these *Law Times* articles: [Winkler calls for 'fresh' approach with expanded mandatory mediation](#) and [Winkler sparks important debate on mediation](#), published September 20, 2010.

Finally, [When breaking up is hard to do](#), from the June 2010 edition of the *National* magazine, is sub-titled "same-sex couples who split find provincial family laws have not kept pace with their hard-won rights." Lawyers quoted in the article argue that changes are needed to ensure equality in marriage and divorce matters across Canada.

Staying Current With Online Resources

There's a wealth of information on family law topics available free online, from newspaper articles to scholarly papers. Check out these useful resources on current family law issues:

From the Canadian Bar Association's 2010 Canadian Legal Conference held August 2010:

- [Family Law and the Blended Family: An Introduction to the Basic Law](#) by John-Paul Boyd
- [GLBT Families and Assisted Reproductive Technologies](#) by Joanna Radbord
- [Far-Flung Families: Family Law Across Borders](#) by John-Paul Boyd

The most recent edition of the CBA's [National Family Law Section](#) Newsletter [The Family Way](#), published September 2010.

The Avoid a Claim blog has recently posted a practical [tip sheet for presenting spousal support claims](#) authored by The Hon. Justice Stanley Scherr.

Fraud Update

The cross Canada fraud attempts involving collaborative family law agreements are continuing with slight variations in the scam details according to this [post](#) on [Avoid a Claim](#). The elements of the scam are set out in a previous post: [Update on ongoing collaborative family law agreement frauds](#). Should you become the target of such a fraud do not cash the cheque or contact the fraudster. Call the Law Society of Manitoba's Colleen Halpenny at 926-2034 for further information.

Fall CPD Programs: LSM

[Affidavits, Expungements & Case Conferences](#) - Articling students and those new to the practice of family law are invited to attend this Bench & Beer program dealing with the often confusing world of affidavits and case conferences. The program takes place on October 28, 2010 from 5:00 - 7:00 p.m. at the Law Society classroom. Beer and pizza will be served as chair Mr. Justice Michael Thomson, and presenters Master Carol Sharp and Lawrence Pinsky lead a discussion and answer questions from the audience. Use this [registration form](#) to reserve your spot.

[Writing to Win: Results-Oriented Writing for Busy Solicitors](#) and [Speaking to Win](#) - The Law Society is pleased to have nationally acclaimed lecturer and writer Steven Stark present these two programs on October 20, 2010. Registrants can attend either the morning or afternoon program, or register for both at a discount.

[Estate Planning for Common-Law Couples & Blended Families](#) - Estate planning strategies must be crafted to address the requirements of different family structures. Presenters Jennifer Pfuetzner and Christine Van Cauwenberghe will review the issues to keep in mind when

creating estate plans for common law couples or blended families, and look at spousal trusts and new investment products at this half day program to be held November 4, 2010, 1:00 - 4:00 p.m. in the Law Society classroom.

Remedies From Dollars to Sense? - 2010 Isaac Pitblado Lectures

The [2010 Isaac Pitblado Lectures](#) will explore developments in the law of remedies in both the traditional courts and administrative bodies. Keynote speakers include The Hon. Mr. Justice Cromwell of the Supreme Court of Canada, Dame Hazel Genn, Faculty of Laws, University College, London, and Professors John McCamus, Kent Roach and Gerald Heckman. The lectures will be held November 26 and 27 at the Fort Garry Hotel. [Register](#) before October 1 to take advantage of the early bird discount.

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