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In This Issue



## Retroactive Spousal Support Orders Permissible Under ***FMA***: MBCA

The Dickson case is back in court, with both the Manitoba Court of Appeal and the Court of Queen's Bench releasing decisions in March. *Dickson v. Dickson*, 2011 MBCA 26 is an appeal from the October 2009 decision. It considers whether the trial judge had the jurisdiction to order spousal support retroactive to the date of separation. The court rejected the husband's argument that *DBS* should not be extended to spousal support applications because spousal support differs fundamentally from child support. They found that the Supreme Court's unanimous decision in *Kerr v. Baranow* (decided after this appeal was heard) concluded otherwise and is a complete response to the husband's argument. (para.7) The court also rejected the argument that without a specific provision in the *FMA* permitting the court to order spousal support to commence on a date prior to the date of application the court has no jurisdiction to make such an order. Likening the Manitoba legislation to the *Divorce Act* (which also contains no retroactivity clause) the court followed the reasoning in *DBS* to find that an original order of spousal support may be retroactive to a date preceding the date of application.

In *Dickson v. Dickson*, 2011 MBQB 55 the court orders the husband to post security for costs before proceeding with his application to vary child and spousal support. While acknowledging that the court's discretion to order security for costs in domestic proceedings should be exercised with extreme caution, the court found it both necessary and appropriate, considering that the husband still owed $180,000 in previously assessed costs as well as substantial arrears.

## Moot Appeal Analysis: MBCA

In *Ludlow v. Ludlow*, 2011 MBCA 29 the court granted a stay of the wife's appeal of an earlier order pending a final decision on the husband's motion for summary judgment to confirm an agreement he says the parties made in which the wife agreed not to appeal. Since success on the motion for summary judgment would resolve the underlying application, the onus was on the wife to demonstrate why the court should depart from its usual practice of refusing to hear moot appeals. In this case the appeal was not so exceptional that the court would decide to hear it on its merits. In addition, although the husband would not suffer irreparable harm if the stay were refused, the balance of convenience favoured neither party.

## Alberta Court of Appeal First to Rule on Collaborative Law Standards

Collaborative law lawyers are subject to the same standard of care as other family law lawyers according to a unanimous Alberta Court of Appeal in *Webb v. Birkett*, 2011 ABCA 13. The court overturned the lower court decision (summarised in our September 2009 eLaw) dismissing a negligence claim against the collaborative family law lawyer. The court commented as follows on the collaborative process:

> While clients are entitled to forfeit legal entitlements through the collaborative family law to achieve benefits that may not be available through litigation... the collaborative family law process does not excuse their lawyers from obtaining the information required to give the advice needed to support informed settlement decisions. Interest-based bargaining does not excuse a lawyer from first advising his or her client of their legally-based rights, or at least giving a comprehensive and even compelling description of the risks faced by proceeding without having received full disclosure. Without that information, the client cannot make an informed decision to forfeit anything in the hopes of achieving extra-legal goals such as ongoing parental harmony. The fact that a collaborative family law lawyer may leave control of the outcome with their client does not excuse that lawyer from giving the client the information needed to exercise that control in her own best interests. Family law clients are often particularly vulnerable, either emotionally, financially or both, and can fall victim to the "quick fix" offered by collaborative family law at a time when they are in a poor condition to exercise proper control over outcomes. (para.56)

## Recent Q.B. Decisions

*Anderson v. Anderson*, 2011 MBQB 57 - Given the lack of a market for shares in a rural accounting corporation (and the consequent difficulty in determining a fair market value under s.15(2) of *The Family Maintenance* Act) the court used its powers under s.15(3) to determine the liquidation value of the corporation assets on a per shareholder foundation. The court arrived at a net payable figure of $257,119.00 for the liquidated corporation, taking into account both goodwill and taxation issues.

*L.M.A.M. v. C.P.M.*, 2011 MBQB 46 - the court considers the best interests of the children, credibility issues, interventions by a psychologist, and an expert psychologist's report in this difficult custody variation involving parental alienation by the father. Despite concluding that there was little likelihood of the unrepentant father "being successfully enlisted to figuratively write a new life book for the children," the court accepted the psychologist's opinion concerning the critical importance of the father's role in the remedial, therapeutic process to the best interests of the children and to the success of that process.

*M.B. v. F.A.*, 2011 MBQB 7 the court declines to terminate the support obligations of a father who argued that his daughter had unilaterally terminated their relationship.

## More on ***Kerr v. Baranow***

*Kerr v. Baranow*, 2011 SCC 10, the unjust enrichment case summarised in last month's eLaw, continues to generate discussion. It has already been analysed in several cases (including *D.P.S. v. B.H.L.*, 2011 BCSC 327 and the Manitoba Court of Appeal decision in *Dickson*, above) and is discussed in these articles and blogs:

*No pre-nup? The Division of Property in Common Law Separations, Kerr v. Baranow*, posted March 16, 2011 on The Court;

- *Family Law: Kerr and Vanasse create no presumption of shared property*, *Law Times*, March 14, 2011;
- *Kerr v. Baranow*, Rule of Law blog, March 5, 2011;
- *Common-Law Spouses Now Making Property Claims*, Aird & Berli.

## Canadian Stats on Custody, Access and Support

Although Manitoba is not a participating province, the statistical information on Canadian family court cases in the latest issue of Juristat (a Statistics Canada publication) may be of interest to family law lawyers. The issue contains two articles: *Family Court Cases Involving Child Custody, Access and Support Arrangements, 2009/2010* and *Child and spousal support in metropolitan and non-metropolitan areas, 2009/2010*. The data for the first article comes from the Civil Court Survey for Nova Scotia, Ontario, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut. Not surprisingly, support is the most common issue for lengthy cases. The second article examines child and spousal support cases registered with maintenance enforcement programs in eight jurisdictions: Newfoundland and Labrador, Prince Edward Island, Nova Scotia, New Brunswick, Saskatchewan, Alberta, Yukon and the Northwest Territories. Its data came from the Survey of Maintenance Enforcement Programs.

## Recommended Reading

Family law lawyers may be interested in the following publications:

- The April 2011 edition of *The Family Way*, the CBA National Family Law section newsletter, contains articles on distance mediation, interviewing children, the spousal support advisory guidelines and shared custody and the child tax benefit. It includes the article *The Spousal Support Advisory Guidelines - Don't Be Lost in the Range or in the Details* which links to the original article of the same name prepared for the 2010 Federation of Law Societies National Family Law Program.
- Taking Action: The Pros and Cons of Litigation is a recent publication of CLE BC, posted on Practice Points on March 4, 2011. It summarises the advantages and disadvantages of going to court in family law matters.
- Nicholas Bala and Rachel Birnbaum discuss the latest research on children's participation in custody disputes in *Listening to children in custody disputes*, a *Lawyers Weekly* article from April 8, 2011.

## Enforcement Legislation in Force

Sections 4-6 of The Strengthened Enforcement of Family Support Payments and Miscellaneous Amendments Act (Various Acts Amended), S.M. 2010, c. 28 came into force March 1, 2011. These sections empower the child support service to deem that a party has disclosed updated income information when the party fails to do so, and to recalculate the amount of a child support order on the basis of the deemed income.

## Upcoming Education Programs: MBA

The Family Law section of the Manitoba Bar Association is presenting a program on Retroactive Child and Spousal Support on May 6, 2011, from 12:00 noon to 1:30 p.m. at the Law Society classroom. Speakers Terry Beley and the Honourable Mr. Justice Michael Thomson will discuss retroactive orders in fresh applications and in applications to vary existing orders, and review both Supreme Court and Manitoba cases on this topic.

The Alternative Dispute Resolution section will discuss The Business of Being an Arbitrator at its next meeting on April 19, 2011, from 12:00 noon to 1:15 p.m. The meeting will be held in the 3rd floor boardroom at 363 Broadway.

## Submission Deadline for National Family Law Program Papers: FLSC

The deadline is approaching for those proposing to write papers for the 2012 National Family Law Program, to be held July 16-19, 2012 in Halifax, N.S. The Federation is accepting proposals until May 30, 2011.