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### **Modified Test for Stay of Proceedings In Abuse Registry Hearings: MBCA**

The general test for the granting of stays of proceedings applies on a motion for the stay of a hearing to enter an individual's name on the Manitoba Child Abuse Registry pending determination of child protection proceedings, but should be modified to incorporate consideration of the best interests of children said the court in [\*E.G. et al. v. Child and Family All Nations\*](#), 2012 MBCA 65. The court lifted the stay imposed by the motions judge, finding he had erred in seeming to place the onus on the ANCR to show that they would be prejudiced by the granting of the stay and in not considering the public interest in the protection of children.

## "More Should Have Been Done": MBQB

The court limited a retroactive variation award to a period of three years from the date of formal notice to the father in [\*Simpson v. Lockman\*](#), 2012 MBQB 216, balancing concerns that both parents contributed to the fact that the children received inadequate support for over ten years (the father by moving away from South Africa without notice and effectively disappearing from the children's lives, and the mother by being "unduly and remarkably dilatory in seeking to enforce and update the father's child support obligations to the children"). In addition, the court found that because one of the children did not meet the statutory definition of child when the variation application was finally made (he had dropped out of university for financial reasons but had since re-enrolled), it was not possible to enforce any unfulfilled *retroactive* obligation by the father to support him during earlier times. (para. 53)

## Master's Order Reinstating Licence Quashed: MBQB

The master overstepped his jurisdiction when he made an order reinstating the driver's licence of a father who was delinquent in his maintenance payments in [\*Paynter v. Henderson\*](#), 2012 MBQB 209. The master described the designated officer's action in suspending the licence as "an abuse of power" and stated that in rural Manitoba "a licence is the same as food and water and in certain circumstances just as essential as air." The appeal judge found no jurisdiction for such an order in [s.57\(3\)](#) of *The Family Maintenance Act* (which circumscribes the authority of the master in a show cause hearing) or elsewhere. The judge also noted that the making of an opposed order, of the court's own motion, and without any evidentiary record, might also be grounds for setting aside the order.

## Judge Deplores Selfish Utilization of Court Process: MBQB

In [\*Dunford v. Dunford\*](#), 2012 MBQB 204 the judge declined the petitioner's bid for an order of elevated costs to sanction the respondent "for his alleged slow and inaccurate financial disclosure and to partially compensate her for expenses she incurred to have her expert analyze that disclosure, and (the other issues having been settled) to advance her costs claim thereafter." Asking the court to assess the costs to which the petitioner might have been entitled is an enterprise unworthy of engaging the court's time and energy, said the judge, particularly when court time is at a premium on the final sitting day before the summer recess. The parties filed well over a thousand pages of material "littered with passages in which counsel take objection, obstruct and harangue, and make caustic comments to each other."

The judge also seized himself of all further interim proceedings so as not to inflict the task of reviewing the voluminous materials "upon any of (his) unsuspecting colleagues." He concluded by pointing out that access to justice should not to be dominated by those with funds and audacity:

The excessive and, frankly, selfish utilization of the court's process should not be permitted to occur; there must not be resignation that this is the foregone course of domestic litigation where there happens to be the coincidental alignment of personal animosity between counsel, the receipt by them of irrational instructions, and the possession by their

## "There Has To Be A Better Way": MBQB

Justice Little questions the efficacy of the current child welfare system in an afterword to his decision to grant the agency a permanent order of guardianship for three young children in [\*Metis Child, Family & Community Services v. A.M.H. and J.P.S.\*](#), 2012 MBQB 193. His comments address troublesome information he received about the post-apprehension placement of one of the children.

## Other Family Division Cases

- [\*Chaput v Graham\*](#), 2012 MBQB 233 - the court refuses to make an order for security for costs against a mother fighting for custody, finding that "(t)he application of what is essentially a financial penalty against a parent seeking to establish what is in the best interests of his or her child makes it impossible for the court to fulfill its duty to the child affected by the dispute between the parents." (para. 36)
- [\*Chevalier v. Chevalier\*](#), 2012 MBQB 208 - the court ordered the sale of jointly owned farmland after 7 years of legal wrangling and over the protests of the husband who wanted to partition the property so that he could keep land that had been in his family.
- [\*Caldarola v. Buscemi\*](#), 2012 MBQB 203 - the court ordered spousal support on the lower end for a mother who refused to attempt to return to work as a nurse or otherwise because she felt her school age, special needs children needed her.
- [\*Dundas v. Schafer\*](#), 2012 MBQB 200 - the court reviews the factors to consider when determining costs for an unsuccessful challenge to the law respecting provincial pension releases in pre-nuptial agreements. Among other things the court found that double costs under Rule 49.10 did not apply since the offer to settle dealt with two separate proceedings, only one of which was the subject of the trial. The court also found that the new tariff amounts should not be applied to all steps taken, and that litigating a novel issue of law did not make the plaintiff a public interest litigant.
- [\*Zacharias v. Zacharias\*](#), 2012 MBQB 199 - the court declined to restrain a father from unilaterally moving the children from Morden to Winnipeg, finding his relocation plan met the medical/educational needs of one of the children who would soon be entirely deaf.

## ***Kerr v. Baranow* Unjust Enrichment Claim Decided: BCSC**

The B.C. Supreme Court recently released its decision in [\*Kerr v. Baranow\*](#), 2012 BCSC 1222, the new trial on unjust enrichment ordered by the Supreme Court of Canada in [\*Kerr v. Baranow\*](#), 2011 SCC 10. Applying the analysis set out by the SCC, the trial court found that the parties were engaged in a joint family venture and that it would be unjust for the respondent to retain the primary asset (property in his name only) given the claimant's contributions over the 25 years they were together. The claimant was awarded \$240,000 and costs, a result similar to the original trial award of \$315,000.

## Resources for Family Law Lawyers and Clients

The April 2012 edition of *The Family Way* contains two articles on resources for those who are involved in the family justice system. The first, [\*The Inventory of Government-Based Family Justice Services\*](#), links to the Department of Justice [database of Canadian family justice services](#), which is searchable by jurisdiction or by type of service. It also contains a report on family justice services and a legislative overview. The second article, [\*Parenting after separation: Resources to help clients help themselves\*](#), contains several good suggestions for developing a list of support services and online resources to empower clients.

## Developers of Tax Toolkit for Family Lawyers Seek Input

The Family Law section of the Canadian Bar Association is [seeking feedback](#) from family law lawyers on their experience dealing with the *Income Tax Act* and its administration, including encounters with Canada Revenue Agency personnel. The section has collaborated with the Department of Justice and the Canadian Revenue Agency to secure government funding to put together a tax toolkit for lawyers working with separating and divorcing families. The deadline to provide feedback is October 1, 2012.

## Domestic Contract Matter Toolkit

The [August issue](#) of *LAWPRO* magazine (published by the professional liability insurer for Ontario lawyers) contains an article describing a new [domestic contract matter toolkit](#) developed to help Ontario lawyers avoid malpractice claims. The kit contains four forms and checklists designed to ensure lawyers obtain the right information from, and communicate adequately with, clients. They also provide a paper trail of the work done.

## Recommended Reading

Family law lawyers may be interested in these publications:

- [2012 Opening of the Courts in Toronto](#) (Slaw) - discusses the focus on family law by both judges and protestors at the recent court opening ceremony in Toronto, signalling the need for reform in this area. The post contains links to speeches made by Justices Winkler, Smith and Bonkalo.
- [Tax Court Rules on Deductibility of Legal Fees to Claim or Enforce Support](#) (BC Family Law Resource blog) - this post discusses [Sarophim v. The Queen](#), 2012 TCC 92, which deals with the tax deductibility of legal fees relating to support payments following separation.
- [Supreme Court Releases Decision on Child Vaccination](#) (BC Family Law Resource blog) - discusses a [B.C. case](#) in which child vaccination was an issue.
- [Silver separation has shades of grey](#) - this *Lawyers Weekly* article looks at the growing trend of seniors divorcing.
- [Appeal court reinforces ADR clauses in family law cases](#) - this *Law Times* article discusses the decision in [Grosman v. Cookson](#), 2012 ONCA 551, that a court has no jurisdiction to vary spousal support

where the separation agreement has an exclusive arbitration clause.

## **Fall Programs: MBA/CBA**

The Hon. Justice Thomas A. Cromwell of the Supreme Court of Canada is the keynote speaker at the first [meeting of the Family Law section](#) of the MBA on September 21, 2012. He will discuss the impact of the Supreme Court's groundbreaking decision in *Kerr v. Baranow* and address the issue of access to justice in the family law context. The program takes place at 12:00 noon at the Law Society classroom, 219 Kennedy Street. RSVP online, by email, or by telephone at 927-1211.

Also on September 21, 2012 is the CBA's Toronto webcast [3rd Annual "Bread and Butter" Issues in Family Law](#), which covers pensions, marriage contracts, pleadings, lump sum spousal support awards and other issues. For more information and to register see the [CBA website](#).

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