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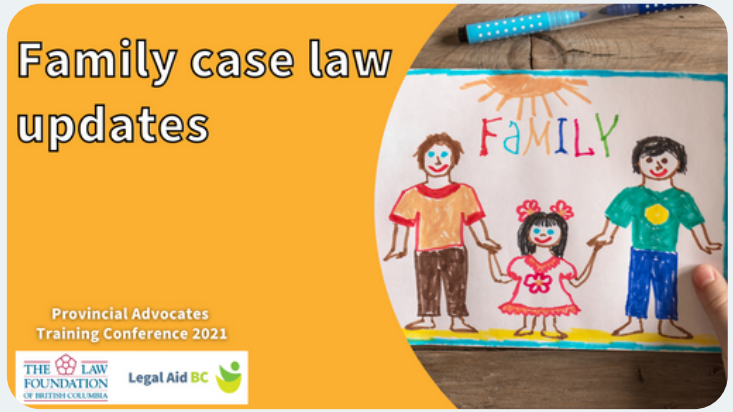


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# Provincial Advocates Conference

# Family Law Update

October 6, 2021

Agnes Huang
Saltwater Law

# Child Support

***Colucci v. Colucci***, 2021 SCC 24

(companion decision to *Michel v. Graydon, 2020 SCC 24)*

- The parties divorced in 1996.
- The Mother was granted sole custody of the parties' two daughters.
- The Father was required to pay child support in the sum of $115 per week.
- In 1998, the Father requested to reduce his child support obligations, but provided not financial disclosure, so no agreement was reached by the parties.
- The Father made no voluntary child support payments from that time on.
- The Father's child support obligation came to an end in 2012.
- In 2016, the Father sought to retroactively reduce child support and rescind the arrears of approximately $170,000.

# Child Support

- The Ontario Superior Court of Justice retroactively decreased the child support by $41,642.
- The Ontario Court of Appeal overturned that decision and ordered the Father to pay the full amount of the arrears.

The Supreme Court of Canada dismissed the Father's appeal.

# Child Support

- The SCC held that courts need a wide discretion to vary child support orders to ensure the correct amount of child support is being paid and to adapt to the enormous diversity of individual circumstances that families face.
- The Court set out the three interests that must be balanced to achieve a fair result:

# Child Support

1) The child's interest in receiving the appropriate amount of support to which they are entitled;
2) The interest of the parties and the child to have certainty and predictability; and
3) The need for flexibility to ensure a just result in light of fluctuations in the payor's income.

The child's interest in fair standard of support commensurate with income is the core interest to which all rules and principles must yield.

# Child Support

- The Court went on to say that any framework for decreasing child support must also account for the informational asymmetry between the parties and the resulting need for full and frank disclosure of the payor's income.
- Disclosure in the linchpin on which fair support depends and the relevant legal tests must encourage timely provision of necessary information.

# Child Support

- It is the payor who knows and controls the information needed to calculate the appropriate amount of support.
- Full and frank disclosure of income by the payor lies at the foundation of the child support regime and is also a precondition to good faith negotiation.
- Without it, the parties cannot stand on equal footing required to make informed decisions and resolve child support disputes outside of court.

# Child Support

- The payor's duty to disclose income information is corollary of the legal obligation to pay support commensurate with income.
- Proactive disclosure of changes in income is the first step in ensuring that child support obligations are tine to payor income as it fluctuates.

# Child Support

- Once a material change is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave effective notice, up to three years before formal notice of the application to vary.
- Effective notice requires clear communication of the change in circumstances accompanied by disclosure of any available documentation to substantiate the change.
- It is not enough for the payor to merely broach the subject with the recipient.

# Child Support

- In the absence of effective notice, certainty and predictability for the child are to be prioritized over the payor's interest in flexibility.
- The recipient is entitled to rely on the court order or agreement in the absence of proper communication and disclosure by the payor showing a decrease in income that is lasting and genuine.
- The payor has control over the date of notice and the date of retroactivity.

# Child Support

- Even where payor gives effective notice, the period of retroactivity is presumed to extend no further than three years before the date of formal notice.
- The presumptive three-year limit allows the parties to negotiate but recognizes that the payor must commence proceedings in a timely manner to protect the certainty interests of the child and recipient.
- The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair in the circumstances.

# Child Support

- The court will consider the four factors set out in *D.B.S.,* adapted to suit the retroactive decrease context:

1) Whether payor has an understandable reason for the delay in giving effective notice or formal notice. The recipient's delay in enforcing arrears is irrelevant.
2) The payor's conduct, including efforts to disclose and communicate with the recipient and to make genuine efforts to continue paying as much as the payor can.

# Child Support

3) The circumstances of the child, such as if the child has experienced hardship or is currently in need. This factor militates toward a shorter period of retroactivity. Whether the recipient would be required to repay support to remedy an overpayment. It would rarely be appropriate to retroactive decrease support to a date before the recipient could have expected that the support payments might need to be repaid.

# Child Support

4) Hardship to the payor if the period of retroactivity is not lengthened beyond the presumptive date. The payor must adduce evidence the establish real facts supporting a finding of hardship. Hardship carries much less weight where brought on by the payor's own unreasonable failure to make proper disclosure and give notice to the recipient. Hardship must be viewed in the context of hardship to the recipient and the child is the period is extended.

# Child Support

- In terms of rescinding arrears based on current inability to pay, the only relevant factor is the payor's ongoing financial capacity.
- The payor must provide sufficient reliable evidence to enable the court to assess their current and prospective financial circumstances.

# Child Support

- There is a presumption against rescinding any part of arrears.
- The presumption will only be overcome if the payor can establish on the balance of probabilities that, even with a flexible payment plan, the payor cannot and will never be able to pay the arrears.
- Recission of arrears is a last resort in exceptional cases.

# Child Support

- In *Colucci*, the SCC held that the Father's deficient communication, inadequate evidence and insufficient disclosure are fatal to this application for a reduction of child support retroactively and to his application to rescind arrears.
- The Father's conduct shows bad faith efforts to evade the enforcement of the court order.

# Parenting Time

***A.G. v. C.A.G.***, 2021 BCSC 1718, Master Robertson

- Parties had an 8 year-old son. The Respondent Mother had been diagnosed with cancer. She was a proponent of homeopathic, holistic and natural remedies and therapies.
- The Father deposed that the child told him the mother made the child urinate in a jar and that she then put some of the urine in a smoothie for him to drink. Father said he found jars of urine int the bathroom.
- The Father also alleged that the Mother does not believe in COVID-19 and is an anti-masker and an anti-vaxxer.

# Parenting Time

- The Mother deposed that:
- she had never used urine therapy on the child and that she had never put urine in his food or drinks.
- she gave the child a jar to pee into to monitor his lymphatic system, to check if his kidneys are filtering.
- The Father primarily only feeds the child a diet consisting of high fat, high sugar and high salt, leading her to be concerned for the child's health.
- she dumps the urine in the toilet after she lets it sit for the sediment to fall to the bottom before checking it.

# Parenting Time

- Master Robertson found that both parties exaggerated in regards to the wrongdoing of the other.
- But the Court found that father's evidence was more balanced and centered on the child while the mother wan more focused on defending her health beliefs and minimizing their effects of the child.

# Parenting Time

- Master Robertson noted a number of factors that undermine the Mother's credibility, including:

- independent evidence is contrary to her evidence. For example, the evidence of the child's family doctor that the child reported that there was urine being put in his food.
- her evidence in respect of her beliefs as to the health benefits of urine therapy are rife with opinions and unproven therapies.

# Parenting Time

- her use of extreme language and adjectives, such as “gaslighting”, “narcissistic abuse”, “terrorizing” and “dictatorship” suggests exaggeration and there is often no often no factual description to support such adjectives.
- the Mother’s friends swore affidavits in support of her parenting that are self-serving. There was little detail to establish that the deponents were aware of any of the allegations being made against either party and the affidavits were rife with opinions and superlatives.

# Parenting Time

- Master Robertson concluded that the Mother was acting in such a way that her judgement, particularly as to health matters and the risk of urine therapy, constituted exceptional circumstances to warrant supervised parenting time.
- Court ordered that the Mother would have parenting time from Sunday at 6:00 pm until Wednesday at 6:00 pm, supervised by a professional supervisor or a third party agreed to by the parties.

# Parenting Arrangements

***Aujla v. Gill***, 2021 BCSC 1671, MJ Shergill

- The parties had four children, ages 7 to 13 and had resided primarily with the Mother since separation.
- The Father's alcohol dependency had led to the breakdown of the marriage (in 2015), but he had been sober for almost 3 years.
- The Mother had been homeschooling the children, against the Father's wishes.
- After he became sober, the Father had parenting time supervised by the Mother.

# Parenting Arrangements

- At the start of the COVID-19 pandemic, the Father had difficulty exercising his parenting time as the children became distant from him and the Mother was not actively encouraging the children's cooperation.
- Unbeknownst to the Father, the Mother moved with the children from the Lower Mainland to Kamloops in later on in 2020.

# Parenting Arrangements

- A section 211 report was ordered, and the assessor (Dr. Elterman) found early stages of parental alienation.
- Dr. Elterman also concluded found that the children were several grades behind academically – they spent an hour a day on school and had not structured education plan – and had motor deficits that were not treated. He did not recommend continued homeschooling

# Parenting Arrangements

- During the course of the trial, MJ Shergill made an interim order for unsupervised parenting time for the Father and also ordered the Mother to return to the Lower Mainland with the children.
- The Court found the Father to be a credible and reliable witness and the Mother to be not.
- MJ Shergill found the Mother to be woefully unequipped to homeschool the children, and that her moves were motivated by her desire not to co-parent with the Father.

# Parenting Arrangements

- The Court gave little weight to the children's expressed desire not to see their Father because of the negative influence of the Mother in shaping their opinions of their Father.
- MJ Shergill found the Mother's conduct did not reach the level of parental alienation but that she was on a path to it.
- MJ Shergill found that the children's emotional well-being was better served by increasing their time with their Father, with a goal of reaching equal shared parenting.

# Parenting Arrangements

- MJ Shergill concluded that the Father was better equipped to meet the children's educational and health needs and he was awarded final say in decision-making on those matters.
- The Mother consented to conduct orders, including that she encourage the children to have a good relationship with their Father and that she not talk negatively about the Father.
- MJ Shergill seized herself of the matter for one year.

# Imputation of Income (1)

***French v. French,*** 2021 BCCA 30

- The parties were involved in a family law proceeding a few years prior, in which matters of division of property and spousal support were addressed.
- The Wife now brought an appeal alleging that the judge had erred in calculating support payable to her based on imputing income to her prior to a motor vehicle injury that left her unable to work.
- The judge accepted that the Wife could not work due to her medical condition, but still attributed her pre-accident income to the Wife which reduced her entitlement to spousal support to zero.

# Imputation of Income (1)

- The Court of Appeal found that the judge had erred by setting the Wife's income at her pre-accident level on the expectation that she "presumably" would be compensated for the loss of income through her ICBC claim.
- The Court held that the prospect of reimbursement at some point in the distant future does not represent proper basis for imputing income to someone who has not received that income.

The Court of Appeal allowed the Wife's appeal.

# Imputation of Income (2)

***M.F.W. v. M.A.H.***, 2021 BCSC 1581 MJ Basran

- After a trial in 2019, the Husband was ordered to pay child support and spousal support on an annual salary of $170,000, derived primarily from a company he invested in.
- The Husband had inherited several million dollars of assets a year prior to the end of the marriage.
- In December 2020, the Husband was laid off and he sought to reduce his support payments and cancel arrears

# Imputation of Income (2)

- The court denied the Husband's application.
- MJ Basran noted that the Husband reported only $67,521 of annual income but stated $13,000 in monthly expenses with no corresponding increase in debt.
- In addition, the Husband gave inadequate explanation of why his assets worth several million dollars seemingly generated little income.

# Imputation of Income (2)

- The Husband also failed to prove that his alleged health problems impaired his capacity to work
- The Husband had extensive experience as a heavy equipment operator and in construction.
- MJ Basran found the Husband to be deliberately under-employed.
- The Court imputed income of $125,000 to the Husband. No income was imputed to the Wife.

# & Cancelling Arrears

- Regarding the arrears, the Court held that despite the significant decline in the Husband's income, it was uncertain that it would be longstanding and there was a paucity of evidence of the Husband's efforts to obtain other employment.
- Moreover, given the Husband's lack of financial disclosure, MJ Basran was not satisfied that it was grossly unfair not to cancel or reduce the arrears owing.

# Without Notice Orders

***P.F. v. J.T.F.***, 2021 BCSC 1506 Master Elwood

- The parties were married in 1998 and separated in April 2020 but remained living the family home.
- The Wife sought and was granted (by Master Scarth) an *ex parte* order for exclusive occupation of the family home, a protection order, and a financial restraining order. The police removed the Husband from the home.
- The Wife deposed to a history of family violence during the marriage, including that she had to flee to a women's shelter; the Husband was charged with uttering threats and released on undertakings.
- The Wife deposed that the physical assaults diminished after the Husband was arrested but that he found other ways to abuse her, including degrading her, spitting on her and calling her prostitute.
- The parties' eldest child, who was 20, deposed that his father had physically, verbally and mentally abused him throughout his life.

# Without Notice Orders

- The matter came back on for a full hearing before Master Elwood.
- The Husband sought to set aside the orders, and the wife sought to extend the orders.
- The Court found the Husband not to be credible, and that it was highly improbable for the Wife to fabricate the detailed evidence of family violence in the affidavits.
- Master Elwood found the Husband to have very little self-awareness about his behaviour towards his family.

# Without Notice Orders

- However, Master Elwood found that the Wife's application should not have been made without notice to the Husband.
- Master Elwood cited a recent decision of the Court of Appeal, in which the court described without notice orders as "an extraordinary, powerful, interlocutory remedy which is recognized as having the potential to inflame a dispute between parties in fraught situations"

*Kapoor v. Makkar*, 2020 BCCA 223, para. 11

# Without Notice Orders

- Master Elwood stated that an application for exclusive occupancy of a family home should only be made without notice where there is urgency or a real possibility of violence if notice is given.
- The Court noted that the parties had lived separately in the same home since April 2020 and that while the Wife swore her Affidavit on April 22, 2021, she did not bring the application for exclusive occupancy and a protection order until May 4, 2021. The parties continued to live in close proximity for 12 days.

# Without Notice Orders

- Master Elwood stated that the Wife had reason to be concerned about how the Husband might react if served with an application.
- However, Master Elwood went on to say that a temporary protection order prohibiting the Husband from communicating with the Wife directly about the matter until the application could be heard, would have been preferable to a without notice application.
- Master Elwood stated that, as it was, the without notice order resulted in a sudden and, no doubt, traumatic, police removal of the Husband from the home.

# Without Notice Orders

- Master Elwood added that while it may have been intended to avoid further family violence, proceeding in this manner likely deepened the conflict between the parties. The Wife ought not to have applied without notice.
- In the end, Master Elwood granted the Wife exclusive occupancy of the family home, extended the protection order for one year, and continued the financial restraining order with some modifications.

# Child's Testimony

***T.A.O. v. D.J.M.***, 2021 BCSC 1690 MJ Shergill

- Parties had a 7 year old daughter (N) and a 16 year old (S), who was the step-daughter of the Respondent.
- After the parties separated, the Claimant was concerned that the Respondent had sexually abused N.
- S stated that the Respondent had touched her sexually several years prior.

# Child's Testimony

- The Respondent denied the allegations.
- MCFD and RCMP were involved but no charges laid.
- A section 211 report did not raise any safety concerns about N being alone with her father.
- The Claimant sought to have S testify at trial.

# Child's Testimony

- MJ Shergill allowed the application for S to testify at trial.
- The *Family Law Act* does not preclude a child from testifying or require a child to testify.
- The court would need to determine the credibility of the Respondent and of S, which would be difficult to do on the basis of hearsay statements.

# Child's Testimony

- S was about to turn 17 years old and she had already provided an affidavit in the proceeding. She wished to voluntarily testify out of concern for her sister's well being.
- MJ Shergill found that, based on the material before the court, S was mature enough and old enough to understand the consequences of giving an oath to tell the truth.

# Child's Testimony

- MJ Shergill did grant some testimonial accommodations to S, namely that:
- S would be permitted to testify outside the courtroom but in a courthouse or an equivalent neutral and secure location.
- S could have a support person present, but with an independent observer present to ensure S was not influenced by anyone or relying on written materials

# Child's Testimony

- The Respondent, who was self-represented, was not allowed to cross-examine S.
- The Claimant was to pay $1,500 for the Respondent to retain legal counsel to conduct the cross-examination of S. Anything above that amount was to be covered by the Respondent.

# Child's Testimony

- MJ Shergill concluded with: As I have said, I am very reluctant to have a child participate in the proceeding. To ensure that S is not being pressured by anyone to testify, I make this additional order. Prior to the commencement of S's testimony, she will be required to confirm to the court that her decision to testify is voluntary and instigated by her. In other words, she should not be testifying because she has been told to or asked to testify in this proceeding by any parent, any relative, friend, or legal counsel. The request to testify should be at her own instigation because she believes that this court needs to hear from her.

# Parental Responsibilities

***A.J.H. v K.J.H.***, 2020 BCPC 74 Judge Mundstock

- The Mother and the Father are both Christians but have different spiritual beliefs. The Father is a Fundamentalist Baptist and believes in a literal interpretation of the bible.

- The Father believes the government of Canada should reinstate the death penalty and homosexuals should be put to death. The Father believes a wife has a duty to obey her husband, and that women should not speak or teach in church.

- The Father wants to teach his children his views of the bible so they can thrive by having the same firm foundation and stability.

- The Father believes the Mother's religious instruction is harmful to the children and not in their best interests.

# Parental Responsibilities

- Judge Mundstock granted the Mother the authority to make decisions respecting their religious and spiritual upbringing. The judge was "concerned for the physical, psychological and emotional safety, security and well-being of the children if [the Father] were to participate in their religious and spiritual upbringing."
- The Judge found the Father's views to be "anti-social and will cause the children to be unable to get along with a large number of people".
- The Judge also ordered that the Father's parenting time be in public, so that the Father has little opportunity to teach his religious views to the children.

# Termination of Guardianship

***K.A.G. v. B.G.J.***, 2021 BCSC 142 (MJ Giaschi)

- The claimant Mother sought to terminate the guardianship of the respondent Father.
- There had been several incidents of family violence by the Father during and after the relationship.
- The Father engaged in conduct that was abusive, harassing and threatening, which led to the Mother obtaining a protection order, which the Father breached.
- The Father sent hundreds of abusive emails and text messages and engaged in other harassing conduct.
- The Father was charged and pleaded guilty to criminal harassment, and was sentenced to time served (265 days) and 3 years probation.

# Termination of Guardianship

The Court found that:

[74] Terminating the guardianship of a parent is a draconian step and should only be ordered in the most extreme circumstances and only if the concerns cannot be addressed through the allocation of parenting responsibilities: *M.A.G. v. P.L.M.*, 2014 BCSC 126, at paras. 44-46, *C.A.J. v. N.J.*, 2014 BCSC 279, at paras. 134-135; and *Xu v. Chu*, 2018 BCSC 2222, paras. 57-59.

# Termination of Guardianship

- Mr. Justice Giaschi found that while the circumstances in this case were extreme, they were not so extreme that the Father should be removed as a guardian.
- If the Father were removed as a guardian, he will lose any opportunity of exercising parental responsibilities and parenting time and, much more importantly, the children will likely lose the prospect of a future relationship with their father.
- The Judge added that there is a possibility that the Father can address his issues by attending counselling and seeking other professional help. If he does so, he should have the opportunity to come to court to show a material change in circumstances and thereby resume the role of a supportive, caring and nurturing father to his children. This would be in the best interests of the children.

# Termination of Guardianship

- The Court concluded that the compelling concern of the Mother to be free of the Father's harassing, manipulative and controlling conduct can be addressed by giving the Mother all of the parental responsibilities and by denying any parenting time to the Father.
- It was not necessary to also remove the Father as a guardian of the children at this time.

# Relocation

***Barendreght v. Grebliunas***, 2021 BCCA 11

- The parties have two children, both under the age of 6.
- The Trial Judge allowed the Mother to move with the children from the Okanagan (West Kelowna) to the Bulkley Valley (Telkwa) – 1,000 kilometres apart: 2019 BCSC 2192.
- The two primary considerations in favour of the move were: the financial situation of the parties and their relationship with each other.
- The parties owned a family home which had a significant mortgage and required much-needed renovations; the parties had struggled to make ends meet.
- The Father worked as a carpenter and the Mother held various janitorial positions.

# Relocation

- The Father appealed and sought leave to adduce new evidence about his financial circumstances.
- The Father deposed in an affidavit that he had bought out the Mother's interest in the family home, had sold one-half interest of the family home to his parents and was then able to refinance the mortgage, resulting in an $800 decrease in his monthly mortgage payment. The Father's parents also increased their line of credit to be able to cover the renovations to the house.

# Relocation

- The Father was permitted to adduce new evidence and the appeal was allowed.
- The Court of Appeal held that the new evidence displaces the trial judge's concerns about the parties' financial positions and the Father's ability to remain in the family home in West Kelowna.
- The Court held that the remaining circumstances indicate that the best interests of the children were served by the children returning to the Okanagan under a shared parenting regime.

# Relocation

- The Court of Appeal found the following factors favouring the children returning to the Okanagan:
- Both parents are good parents.
- The Father had a strong bond with the children and had taken “extraordinary steps” to manage his schedule so he could be engaged with the children.
- The children had always lived in the Okanagan.
- The Father’s parents had moved to Kelowna.
- The Mother did not move to Telkwa to advance her career, for better educational opportunities, or because she had a new partner there. The Mother did have family in the area.

# Relocation

- There was no suggestions that the Bulkley Valley provided the children with any benefits not available to them in Kelowna.
- The Trial Judge had allowed the move partly because he was concerned about the Father's past and future treatment of the Mother, and found that the Father had an overbearing personality and the Mother had been subjected to emotional abuse. The Court of Appeal noted that the Mother had not argued that the Father's hostility towards her supported her move to Telkwa. In fact, the Mother had testified that the parties were getting along better than just after separation.

# Relocation

- The Court of Appeal held that:

- "… it is significant that the conclusions arrived at by the trial judge that [the Mother's] need for some emotional support and the concern over [the Father's] behaviour have generally not, on their own, supported a relocation in the case law."

- "There are virtually no decisions of this Court where a need, on the part of the moving parent, for emotional support, even with some friction between the parties, has justified a relocation."

# Relocation

- The Court of Appeal concluded that “permitting the relocation was inconsistent with the object of maximizing contact between the children and both their parents. Indeed, the relocation was likely to permanently and profoundly alter the relationship of the children with their father”.

The Supreme Court of Canada has granted leave to appeal the Court of Appeal’s decision.

# *New Divorce Act – Relocation*

***M.L.E. v. D.K.E.***, 2021 BCSC 1790 MJ Coval

- The claimant Mother sought to move with the three teenaged children to Hamilton; eldest child beginning studies at McMaster University. The Father was opposed to the move.
- The Mother and the children left the family home due to the conduct of the Father.
- A Hear the Child Report was prepared. The children reported that they were scared of their father and noted problems with his drinking. The children want to live with their Mother.
- Mr. Justice Coval noted that the Father is taking positive steps to improve his situation, such as seeking treatment in relation to his mental health and alcohol misuse.

# *New Divorce Act – Relocation*

- Mr. Justice Coval considered the test for relocation under s. 16 of the *Divorce* Act and, on considering the best interests of the children, granted the relocation on an interim basis.
- The Father had conceded that at least for now the children should reside with their Mother.

[38] The case law recognizes that relocation is one of the most impactful decisions a court is asked to make, potentially having a long-term impact on children's relationships with the non-relocating parent (*Nolie v. Reece*, 2016 BCSC 2201). That is especially so in a situation like this where the proposed relocation is far away.

[39] The cases recommend particular caution regarding a relocation such as this, at the early stage of the proceedings and significantly different from a status quo which is serving the children well. By this of course I mean the current status quo rather than the status quo a few months ago. At such an early stage, before a s. 211 report or a trial, the court may not have sufficient understanding of the situation to assess what is in the best interests of the children.

[40] Despite heeding these warnings, in my view the particular circumstances of this case make it appropriate for relocation. Consideration of the evidence in light of the statutory considerations strongly suggests it is in the children's best interests to move to Hamilton with their mother now.

# Annulment

***Kaur v. Singh***, 2021 BCCA 320

- The Wife appeals the decision of a Chambers judge to deny her an annulment on the basis of non-consummation.
- The Chambers judge held that the Wife had not established physical inability or psychological incapacity to consummate.
- The Husband had not opposed the annulment.

# Annulment

- The parties delayed consummation until they could have a proper Sikh Gurdwara ceremony that, according to their culture and religion, was necessary.
- After the civil ceremony, the parties lived in the same house, but separately. They shared the house with friends. The Wife lived with her friend and the Husband lived with his friend.
- The Wife testified that the Respondent suffered from depression and many issues arose between them and they were fighting so much.
- This led the parties to separate and the Husband moved out of the house.
- The religious ceremony never took place.

# Annulment

- The Court of Appeal held that the established common law concerning incapacity must be applied contextually.
- [17] … in a multi-cultural society that our nation reflects, the common law principles at issue her must be applied contextually, in accordance with the cultural norms of the parties seeking annulment. … a psychological incapacity … can arise as meaningfully from sincerely held religious and cultural beliefs as from other forms of psychological aversion, both being, contextually, a “normal, predictable reaction”…

# Annulment

- The Court of Appeal held that, in these circumstances, a true aversion to consummate arising from religious beliefs established a genuine psychological incapacity.
- The Court did note that it would be helpful for any such cases in the future to have more precise evidence concerning the parties' cultural and religious norms and, importantly, the manner and extent to which those norms impacted non-consummation of the marriage.

The Court of Appeal granted the annulment.

# FMEP Enforcement

***B.C. (FMEP) v. B.B.***, 2021 BCPC 217 Judge Doulis

- An order was made against B.B. in July 2005 that he was to pay $670 per month in child support on an imputed income of $48,000.
- B.B. was incarcerated at the time.
- Over the next 16 years, the only time the Mother received child support from B.B. was when FMEP was able to garnish monies from third parties.
- FMEP doggedly attempted to collect child support from B.B.

# FMEP Enforcement

- B.B. had only earned $48,000 in one year (2012).
- B.B. stated that his sporadic income was due to his intermittent incarceration, addiction issues and his poor health.
- B.B. had not worked in 4-1/2 years.
- B.B.’s only source of monies was income assistance.

# FMEP Enforcement

- B.B. had multiple convictions for which he was incarcerated and also owed fines and restitution to ICBC totaling more than $120,000.
- B.B. struggled with addictions his entire adult life. He was an alcoholic; he used cocaine and then graduated to heroin.
- Due to carpal tunnel syndrome, B.B. was unable to return to work as a welder until he had surgery.

# FMEP Enforcement

- B.B. owed just under $37,000 in child support, with about $13,700 being interest.
- FMEP sought to have B.B.'s income imputed to $25,000.
- FMEP sought an order that B.B. pay $400 per month towards the arrears, and…
- If B.B. failed to make a payment, he was to be incarcerated for five to 10 days for each missed payment, to be served consecutively.

# FMEP Enforcement

- In her conclusion, Judge Doulis took note of the over-representation of Indigenous people in the prison system.
- Because FMEP was seeking incarceration for default, Judge Doulis said it was necessary to apply to guidelines in the *Criminal Code* and in the Supreme Court of Canada's decisions in *R. v. Gladue* and *R. v. Ipeelee* in respect of the sentencing of Indigenous people.

# FMEP Enforcement

- The Court may take judicial notice of the broad and systemic factors affecting Indigenous people generally and specifically to the person subject to incarceration.
- Judge Doulis found that the systemic and background factors affecting Indigenous people in Canadian society have likely impacted B.B.
- The Judge noted that the difficulties faced by B.B. "arise at least in part from transgenerational trauma and substance abuse arising from the Indigenous peoples' involvement in colonialism, displacement and residential schools".

# FMEP Enforcement

- Judge Doulis was also cognizant of the impact on B.B.'s former partner (the Mother) and their children, now adults, who are also Indigenous.
- The Judge was not convinced that imprisoning B.B. for non-payment of arrears would improve their lot in life.
- Judge Doulis noted that B.B. appeared to be on a rehabilitative path and she did not want to derail that by imposing a punitive sanction.

# FMEP Enforcement

- Judge Doulis was prepared to order B.B. to pay $100 a month to FMEP on the arrears.
- Judge Doulis was not prepared to reinforce the order with a jail sentence in default.
- Judge Doulis ordered a review after four months.

# Enforcement Measures

***T.B. v. S.S.***, 2021 BCPC 159 Judge Patterson

- The Respondent Father had been found by two judges to have wrongfully denied parenting time to the Mother.
- The Father had previously been fined $1,000 for failure to complete a financial statement, which was due in December 2017. The Father did not pay that fine.

# Enforcement Measures

- The Mother sought an order that the Father be jailed and pay a $5,000 fine.
- Judge Patterson found that two wrongful denials, refusal to obey a court order, and failure to pay a fine was “as close as one can come to the line of being sent to jail...”
- Judge Patterson did not imprison the Father but did impose an additional $5,000 in fines.
- *But next time… it’s off to the slammer!*

# Property - Wasting

***Zilic v. Zilic,*** 2021 BCCA 107

- At trial, the parties' total net family property was determined to be just under $2 million.
- The Judge divided the property equally except that the Judge ordered the Husband to compensate the Mother $50,000 in relation to an investment certificate in a residential development and $85,000 in relation to the family contracting company, which the Judge found to have been wasted by the Husband.
- The Father appealed these orders.

# Property - Wasting

- The Court of Appeal set out the general principles in relation to property division, which include that the court may order an unequal division of family property if it would be “significantly unfair” to equally divide it.
- One factor justifying unequal division is if a spouse after separation causes a significant decrease in the value of family property beyond market trends.

# Property Wasting

- The Court of Appeal allowed the Husband's appeal in relation to the investment certificate and set aside the reapportionment of $50,000.
- The Court held that the investment certificate had no redeemable value at the time of trial and that it was too speculative for the judge to have found that the $175,000 face value of the certificates could have been applied to an alternate real estate development and that it was not an inference the judge could have made on the evidence.

# Property Wasting

- The Court of Appeal dismissed the Husband's appeal in relation the family construction company.
- The Court found that there was no basis to interfere with the judge's finding that the Husband had the benefit of the retained earnings and the shareholders loan account, which he had depleted.
- There was evidentiary support for the judge's conclusion that the Wife should be compensated $85,000.

# Inheritance

***Cook v. Cook,*** 2021 BCCA 194

- The parties were together for 36 years and had 3 children.
- The Wife was primarily responsible for caring for the children and worked part-time with the federal government when they were young. When the youngest was 17, the Wife returned to work full-time until she retired in 2014.
- After separation, the Wife worked part-time and she received an inheritance of approximately $111,000.

# Inheritance

- The Husband worked in finance with car dealerships.
- At the time of trial, the Husband was "unemployed by choice" as the judge described him.
- A few years prior to separation, the Husband received inheritances amounting to $425,000 as well as a half-interest in a cottage.

# Inheritance

- An interim division of property effected by the parties, leaving the inheritances with each party, resulted in the Husband having around $550,000 more in assets than the Wife.
- The judge held that as the Husband would have almost two times the wealth as the Wife, this was a case that warranted unequal division of family property.
- The judge awarded the Wife 70% of the family property, 75% of the savings, and the Mount Baldy property.

# Inheritance

- The Court of Appeal allowed the Husband's appeal.
- The Court held that the judge had erred in law by finding that it would be significantly unfair to equally divide family property because of a financial disparity arising from an inheritance, an excluded asset.
- Financial advantage alone, unrelated to the economic characteristics of a spousal relationship, does not justify departing from the standard division of property.

# Inheritance

- The trial judge had held that an unequal division could be ordered to effect a lump sum payment of compensatory support.
- The Court of Appeal held that the evidence did not support the making of orders redistributing assets in order to provide the Wife with a capital sum as compensatory spousal support.
- The Court held that there was no evidence that the Wife was disadvantaged by the marriage or its dissolution.

# Where to File? New Rules

***A.K.B. v. A.D.W.***, 2021 BCPC 182 Judge Gouge

- The parties lived together in Vancouver with their young child.
- On June 30, 2021, the Mother commenced a proceeding in the Duncan Registry. That same day, she obtained a *ex parte* protection order from Judge Cutler (via telephone).
- The next day, the Mother and child left Vancouver and went to her parents' home on Vancouver Island.

# Where to File? New Rules

- The Father sought to set aside the Protection Order and have the child return to Vancouver and the file transferred to Vancouver.
- Under the old *Provincial Court (Family) Rules*, a proceeding could be initiated in any Registry.
- The new *Provincial Court (Family) Rules* – which came into force May 17, 2021 – provide at Rule 7, that where there is no existing proceeding and there are child-related issues, a family law proceeding must be commenced in the registry closest to where the child resides.

# Where to File? New Rules

- Rule 7(3) of the *PCFR* allows a party to seek leave of the court to file an application for a protection order in a registry other than where the child resides.
- The Mother in this case did not do so and her application should have been filed in Vancouver.
- Judge Gouge transferred the file to Vancouver for all purposes.