FAMILY LAW CHAMBERS PROCEDURE MANUAL

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INTRODUCTION

This Manual sets out many common and uncommon court procedures. Interesting cases are listed, as well as practical suggestions. However, this document can only assist in preparing arguments and identifying issues, it is not legal advice or an opinion. Additional research should always be performed where warranted. As it is intended that this Manual will be updated and re-released in the future, please email Ken Proudman at ken@millerboileau.com if any changes or corrections should be made.

ADDITIONAL RELIEF

Relief is generally sought in the Notice of Application. However, Rule 1.3(2) permits the Court to grant relief whether or not it is claimed or sought in an action. Additional relief can also be sought through methods other than a Notice of Application or pleadings where it is precise and raised in advance.[1]

ADVANCE COSTS

Law

Governed by Rule 12.36. Unlike security for costs, advance costs are designed to place in the hands of the moving party the funds needed to party for some of the moving party's litigation costs.[2]

The test in civil matters is as follows:[3]

1. The party seeking the order must be impecunious to the extent that, without such an order, the party would be deprived of the opportunity to proceed with the case;
2. The claimant must establish a prima facie case of sufficient merit; and
3. There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

[1] *DWH v DJR*, 2013 ABCA 240 at paras 41-44.

[2] *Durocher v. Klementovich*, 2013 ABCA 115.

[3] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

Although some courts have stated that a strict application of the civil test should not be applied in the family law context, the Alberta Court of Appeal recently seemed to have endorsed the civil test in *Pecharsky v. Pecharsky*, 2016 ABCA 259 at para 4, in which it was alleged that the lower court had implemented the wrong test. In any event, courts are usually required to find severe financial disadvantage which may prevent a case from being put forward.[4] There must also be an evidentiary basis to prove that without costs the party would be without the resources necessary to respond.[5]

A separate list of factors is to be considered in appeals.[6]

The payor is not entitled to know what the recipient's counsel is doing in service of the recipient, and isn't entitled to challenge whether that work is reasonable.[7] In some cases it can be ordered that a Bill of Costs be provided periodically, but only to certify that fees and disbursements are charged in relation to the case, as the payor is not entitled to particulars of specific work performed, to know the purpose of disbursements, and is not entitled to a review based on simple doubt.[8]

The trial judge can account for advance costs in a matter deemed appropriate.[9]

There is nothing to prevent the Court of Appeal from also ordering advance costs.[10]

Practice tips

Each party should lead evidence as to the existence of liquid assets, such as cash, bank account balances, and investments. However, even when neither party has significant liquid assets, in some cases an significant imbalance of income may be sufficient.

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[4] *Lakhoo v. Lakhoo*, 2015 ABQB 357 [here one party had approximately 100 times the financial resources].

[5] *McDonald v McDonald*, 1998 ABCA 241 at para 539; *MacFarlane v. MacFarlane*, 2016 ABCA 183 at para 25.

[6] *Scott v. Glazebrook*, 2015 ABCA 235.

[7] *Lakhoo v. Lakhoo*, 2016 ABCA 200 at para 20.

[8] *Lakhoo v. Lakhoo*, 2016 ABCA 200 at paras 22 and 23.

[9] *Gerlitz v. Gerlitz*, 2005 ABCA 424 at para 8.

[10] *Scott v. Glazebrook*, 2015 ABCA 235 at Note 1.

The Court may tie an advance costs order to specific services, such as expert reports, although courts will often be reluctant to impose conditions, as it can be seen as an attempt to impede the opposing side from being represented by counsel, or to obtain privileged information.

Either side may request that the advance costs be tied to the sale of property, especially where there are no liquid assets. An applicant may enjoy more success if they have considered how they will collect on an advance costs award.

The applicant may request for leave to bring a further advance costs application at a later stage of the proceedings, or a direction that the advance costs are only for a certain stage of the proceedings.

See also "Security for Costs" at page 97 of this paper.

AFFIDAVITS

Law

If an application is to dispose of all or part of a claim, then Rule 13.18 requires that Affidavits be based on personal knowledge, not information and belief. This will be met where the judgment or order "finally disposes of the rights of the parties."[11]

Rule 5.2-1 of the Code of Conduct prohibits lawyers from swearing affidavits themselves unless permitted to do so by law, the Court, the Rules of Court, or other procedures of the Court, unless the matter is purely formal or uncontroverted. The commentary expands this duty to prohibit personal opinions, beliefs, or assertions of facts where evidence is subject to legal proof, cross-examination, or challenge. Lawyers should not effectively appear as unsworn witnesses or put their own credibility in issue. If a lawyer is a necessary witness, the file should be given to another lawyer. There are no additional restrictions on the cross-examination of lawyers, and they should not receive special treatment.

Pursuant to Rule 13.19, Affidavits must be in Form 49, state on the front page the person swearing the affidavit and the date it was sworn, the place of residence of the deponent, they must be written in first person, they must be divided into consecutively numbered paragraphs, with dates and

[11] *CIBC v. Williams*, 2007 ABCA 340 at paragraph 11; *Barker v. Budget Rent-A-Car of Edmonton Ltd.*, 2011 ABQB 123 at para 15.

numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer, and be properly commissioned.

Rule 13.20 requires that insertions, alterations, or erasures are authenticated by the initials of the person administering the oath (presumably also with the initials of the deponent), or that the Court's permission is obtained (presumably through fiat).

Practice Note 2 provides that each party may only file one affidavit, except with leave of the Court, or where there has been a relevant change in circumstances since filing. A Supplementary Affidavit "must deal only with the matter permitted by leave or with the relevant changes in circumstances", and must otherwise conform to the same rules.

Practice Note 2 requires that affidavits in morning or afternoon chambers be no more than 5 pages in length, as well as with one-inch margins, and a font of at least 12 point Times New Roman or equivalent. Handwritten affidavits must be legible and are subject to the same page limits. Except with leave of the Court, exhibits must be no more than 40 pages, and consecutively numbered. They must be separated by tabs and listed in a table of contents by exhibit and tab number. The relevant passages of exhibits must be highlighted. Exhibits must be relevant, material, and not repetitive of materials already on the Court file. Leave of the Court is required to introduce CDs, DVDs, flash drives, and such similar electronic exhibits. When a matter is scheduled for Special Chambers, the respondent may file a cross-application and affidavit, and the applicant may then file an affidavit responding to the cross-application, all adhering to the same aforementioned exhibit rules. Prior to applying for leave, notice must be given to the other party. Filing deadlines apply to affidavits filed for Special Chambers.

A party may rely on a previously sworn Affidavit, pursuant to Rule 13.25 (but would presumably still be subject to the number of affidavits permitted by Practice Note 2).

Rule 13.24 permits an affidavit to be sworn by multiple persons, so long as that fact is disclosed in the statement of when, where, and before whom the affidavit was sworn.

A party may apply for leave to file a new affidavit.[12]

[12] *Hamilton v Leach*, 2013 ABCA 423 at para 27.

Rules 6.7, 6.20, and 3.13 permits any party adverse in interest to Question the deponent in relation to the affidavit.

Rule 13.23 requires that an affidavit be translated by a competent translator for a person who does not understand the language in which the affidavit is written. The translator is also sworn to accurately translate the affidavit and oath, and the person administering the oath must certify as to the person's belief that the affidavit was translated for the person swearing the affidavit by the sworn translator. Affidavits must be in English unless the Court directs otherwise, and if translated, must be accompanied by a certificate of the translator that the translation is accurate and complete.

Rule 13.22 sets out additional rules for the visually impaired.

Practice tips

In most interim applications, affidavits based on information and belief are sufficient, which means that an affidavit can contain letters, or even relating statements made by a third party. Although these documents may be admissible, they may still be given less weight, depending on the circumstances. An affidavit sworn by the source of the information is preferable, where available.

Although in most circumstances it will be appropriate for lawyers to sign Affidavits of Execution and Commission affidavits, this should not be done where the deponent's capacity might be at issue.

Although a lawyer should generally not swear affidavits, for uncontroversial procedural items such as Affidavits of Service it is possible to have a receptionist or assistant swear an affidavit, so long as it will not create a conflict of interest or other ethical issues. Doing so may also protect a vulnerable client, particularly if the opposing party frequently questions on affidavits. Privilege may still be asserted. Some counsel have threatened to Question an assistant in an attempt to remove counsel, however if the matter is uncontroversial and there would be little practical benefit they may not follow-through with the threat. That said, it is always preferable to have the client swear the affidavit.

It is most common for a lawyer to become a witness when they are required to testify as to whether or not an agreement was reached. Privilege may still otherwise be asserted to without prejudice communication and solicitor-client privilege. Counsel should then refer the file to another office.

In Alberta, affidavits can be sworn in front of Commissioners for Oaths, whereas outside of Alberta a Notary Public is required.

A person who is objects to swearing for conscientious or religious reasons, or believes that taking an oath would have no binding effect on their conscious, can affirm, pursuant to Rule 17 of the *Alberta Evidence Act*.

See "Privilege" at page 87 of this Manual.

See "Evidence and Hearsay" at page 44 of this Manual.

AFFIDAVIT OF RECORDS (AND NOTICE TO PRODUCE)

Law

In family law matters, Rule 12.38(3) states that an Affidavit of Records need only be produced:

1. If a matter is set for trial: the later of the filing of Form 37 under Rule 8.4 or the scheduling of a trial under Rule 8.5; and 3 months before the trial date; or
2. Where a Notice to Produce an Affidavit of Records is filed and served pursuant to Rule 12.38(2), then both parties must produce their Affidavit of Records within three months.

Rule 5.6 sets out the form and contents of an Affidavit of Records. Form 26 is utilized. All records that are relevant and material to the issues in the action and are or have been under the party's control must be disclosed. It must also be specified which of the records are under the control of the party, which records the party objects to produce and the grounds thereof, a notice stating the place and time that records for which there is no objection may be inspected, which documents the party previously had under their control, when those records ceased to be under their control, the present location thereof if known, and that the party does not have and has never had any other relevant and material record under their control.

A **"record"** is defined in the definition appendix to the Rules to include "the representation of a record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound, or both". This would include notes, calendars, computer files, computer entries, photographs, videos, and such similar records. However, only the relevant portions of records need be produced.[13]

[13] *Lazin v Ciba-Geigy Canada Ltd*, 1976 ALTASCAD 58.

Rule 5.2 provides that a record is **relevant and material** if it could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Rule 5.7 sets out the format of the records themselves. They must be numbered in order and briefly described. They may be bundled and treated as a single record if they are all of the same nature and the bundle is described in sufficient detail to enable another party to understand what it contains. As stated in *Dorchak v Krupka*, 1997 ABCA 89 at para 8, "[a]n affidavit of [records] must show unambiguously what documents' existence it does or does not disclose. It must remove any uncertainly on the following vital question. If a piece of paper turns up later, or is tendered on a motion at trial, has it been disclosed by the previous affidavit of [records]?... It is important that the affidavit remove any doubt on the topic."

Rule 5.14 permits all parties to inspect records on one or more occasion, to receive copies upon written request accompanied with payment of reasonable copying expenses, and to make copies of such records. This does not apply to records for which there is a claim of privilege. A party may request the electronic format of a computer-generated document.

Rule 5.10 requires that where a party finds, creates, or obtains control of records not previously disclosed, they must immediately give notice, supply copies upon written request accompanied by payment of a reasonable copying expense, and serve a Supplementary Affidavit of Records prior to scheduling a date of trial. This imposes a **continuing duty to disclose**.

Rule 5.11 permits the Court to order production where a relevant and material record has been omitted, or a claim of privilege has been incorrectly or improperly made. The Court may also inspect the record and permit cross-examination on the original and any subsequent Affidavit of Records.

Rule 5.12 permits the Court to order a penalty for failing to produce an Affidavit of Records, being twice the amount set out in item 3(1) of Schedule C, being $1000 under Column 1. However, this does not exclude the Court's other remedies, such as striking claims. It is also possible to avoid the penalty by asserting sufficient cause, excusable on sufficient grounds, based on the diligence of that party.[14]

[14] See *Sun Life Assurance Company of Canada v Tom 2003-1 Limited Partnership #2*, 2010 ABQB 815; see also *Chevalier v Sunshine Village Corporation*, 2011 ABQB 544.

Rule 5.15 provides that records listed in the Affidavit of Records are presumed to be authentic, unless a party serves a **notice within 3 months** that the authenticity is disputed and therefore authenticity must be proven at trial. "Authenticity" is defined to include the fact that a document that is said to be an original was printed, written, signed, or executed as it purports to have been, and a document that is said to be a copy is a true copy of the original. However, this presumption can be rebutted. Furthermore, the presumption does not apply where authenticity, receipt, or transmission is denied in the party's pleadings. The Court can also determine that the presumption does not apply.

Rule 5.16 prohibits a party from using as evidence records which were not disclosed, unless the parties agree otherwise or the Court directs otherwise.

Practice tips

A Notice to Produce can be used to force the opposing party to provide their documentation where you suspect that they may not possess sufficient evidence, especially if they are required to meet an onus, for example in the case of exemptions or certain corporate expenses.

The Affidavit of Records is generally not filed.

Records for which there is an objection to produce generally refers to privileged documents. Do not produce these documents for inspection, they must only be described in the Affidavit of Records.

Where there are few records, they will often be attached to the Affidavit of Records or made exhibits. For larger quantities of documents, especially at offices that maintain electronic file systems, the records may be provided on a CD or DVD. Otherwise, documents are often made available for inspection at the office of the party's counsel, during that office's business hours. The logistics are rarely an issue in the family law context, where there are usually only two parties to each action.

These rules do not create an obligation to create a record that does not exist. For example, if a corporation does not keep a General Ledger, these rules would not compel its creation.

Failure to object to authenticity within 3 months could create difficulties at trial, however such failure is not necessarily fatal.

The presumption of authenticity does not apply to admissibility, the admissibility of a record may still be challenged at trial, for example objecting that it is not relevant and material.

The Affidavit of Records process does not apply to the Provincial Court.

See "Privilege" at page 87 of this Manual.

AMENDING PLEADINGS

Law

Rule 3.62(1)(a) permits an unlimited number of amendments prior to the close of pleadings. Rule 3.67 specified that pleadings close when a Reply is filed and served or the time for doing so has expired (being 10 days after receipt of the Statement of Defence, according to Rule 3.33(3)). After pleadings close, pleadings must be amended by application or agreement as set out at Rule 3.62(1)(b) and (c), which refer to Rules 3.74 (pleadings related to the addition, removal, substitution, or correction of the name of a party) and Rule 3.65 for all other amendments. An amended pleading must be filed, and served within 10 days of filing, or as set out in Division 3, Subdivision 2 (one year unless extended up to three months). An amended pleading in response must be filed and served within 10 days of receiving the amended pleading. If no pleading is amended in response, that party's original unamended pleading will be relied on.

The "classic rule" states that any pleading can be amended, regardless of how careless the party was, and regardless of how late the amendment is requested, even if requested at the date of trial.[15] However, there are four exceptions:

1. Where there is serious prejudice to the opposing party which is not compensable in costs. For example they have already prepared for trial or a witness would be unavailable, perhaps due to their health or death;
2. If the amendment requested is hopeless, for example if there is no cause of action pled or no cause of action known to law;

[15] *Balm v 3512061 Canada Ltd*, 2003 ABCA 98, 327 A.R. 149 at para 43; *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2010 ABQB 524 at paras 20-21; *Attila Dogan Construction v AMEC Americas Limited (AMEC E & C Services Limited and AGRA Monenco Inc.)*, 2013 ABQB 525 at para 13 as cited at *D-Line Holdings Ltd. v. Ahlstrom*, 2016 ABCA 351 at para 10.

3. Where attempting to add a party outside of the limitation period set out in the *Limitations Act* (Alberta). This is governed by Section 6(4) of the *Limitations Act* (Alberta). Furthermore, even if an action is barred by the *Limitations Act* (Alberta), it may still be possible to amend the pleadings, the prejudice may simply be addressed through costs; [16] or
4. There is an element of bad faith in not pleading what is sought to be amended. Bad faith is intentional, not merely negligence.

As succinctly stated in *Marlborough Ford Sales Limited v Ford Motor Co of Canada, Ltd*, 2003 ABQB 298 at para 10, "The power to amend is discretionary. The discretion is to be exercised generously rather than restrictively, especially when the amendment is sought early in the proceedings."

Some amendments may require a higher standard of evidence, such as fraud.[17]

Where the Clerks permit an amendment without consent, a party may apply to disallow an amendment within 10 days of service of the amended pleading, pursuant to Rule 3.64.

Costs are generally awarded against the party seeking the initial amendment, pursuant to Rule 3.66.

Practice tips

Several decisions focus on whether a Questioning for Discovery and production of records has been completed.[18] If the amendment is sought prior to these steps, it will almost certainly be permitted.

Prejudice will be more serious where seeking to add a party, rather than when seeking to add a cause of action.

When assessing costs, consider what steps will need to be taken as a result of the amendment, such as corresponding amendments, additional document production, further Questioning, or an adjournment of an existing application or trial.

[16] *926 Capital Corp v Petro River Oil Corp*, 2016 ABCA 393 at para 3.

[17] *Attila Dogan Construction v AMEC Americas Limited (AMEC E & C Services Limited and AGRA Monenco Inc.)*, 2013 ABQB 525 at para 15; *Mikisew Cree First Nation v Canada*, 2002 ABCA 110 at para 61 at para 61; *D-Line Holdings Ltd. v. Ahlstrom*, 2016 ABCA 351 at para 12.

[18] *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2011 ABQB 51 at para 64.

Amendments to the pleading, including amendments to the title of the document, must be underlined, coloured, or similarly identified.

Each amendment must add "Amended", underlined, coloured, or similarly identified, to the title of the document, each time there is an amendment. For example a Statement of Claim which is amended twice would be titled "Amended Amended Statement of Claim".

An agreement to allow amendments will usually take the form of a Consent Order which sets out each party's filing deadlines and cost consequences, and attaches the proposed amended pleading as an exhibit. It may be appropriate to withhold consent where it would prejudice a client and the Court would likely decline the amendment, such as where the matter falls within the four exceptions set out above.

An application to amend should contain the proposed amendment, either in the Notice of Application or Affidavit if limited to a small number of items such as the parties or a particular paragraph, or attached as an Exhibit to the Affidavit.

Note that Rule 3.62(2)(b) requires that the amended pleading be served upon all parties, even if only one party is affected.

It is common to requests costs even where an amendment is consented to. The amount of costs is often the amount set out at Schedule C, being $1000 for an amendment to a pleading or $500 in relation to a contested Notice of Application, where Column 1 applies. However, higher costs may be appropriate where other steps needs to be recommenced, such as Questioning.

It is common to request and grant additional time to file and serve any amended pleadings in response. The commentary to Rule 7.2-1 of our Code of Conduct states that lawyers "should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client".

Adding or substituting a party beyond the limitation period may be relevant where there is a claim against a third party as a fraudulent conveyance, fraudulent preference, through the Fraudulent Preferences Act if insolvent at the time of or as a result of the transfer, or through the Statute of Elizabeth. See "Third Party Transferees (S 10 of the *Matrimonial Property Act*)" at page 118 of this Manual.

APPLICATIONS GENERALLY

Law

Rule 6.3 permits an Application to be filed during an action or after a judgment is rendered. Form 27 must be completed in whole, due to Rule 6.3(2).

At least 5 days' notice of any application is required, unless another rule or statute requires a different period, or the Court orders otherwise. An Application to vary a time period may be made pursuant to Rule 13.5(2). Applications after the granting of a divorce judgment generally require at least 20 days' notice due to Rule 12.45(2).

Rule 6.4 also permits the Court to proceed *ex parte*, without notice, where the Court is satisfied that no notice is necessary or serving notice of the application might cause undue prejudice to the applicant. In an *ex parte* matter, parties have a duty of utmost good faith pertaining to disclosure, they must disclose all material facts.[19] If all material facts are not disclosed, the Order will not necessarily be set aside, but the importance of the undisclosed evidence will be a very relevant factor in determining whether to set the decision aside.[20] Comment 8 to Rule 5.1-1 of the Code of Conduct requires that in *ex parte* matters, "the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled. This situation creates an obligation on the lawyer present to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision."

It has been said that family chambers is over-used as a mini-trial, it bogs down the legal system at the expense of other types of matters, and encourages parties to continue to return to seek further variations.[21]

Conflicting affidavits generally necessitate viva voce evidence, unless they are interim decisions based on sufficient uncontradicted evidence (eg school reports, text messages, medical notes, child welfare concerns).[22]

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[19] Duke Energy Corporation v. Duke/Louis Dreyfus Canada Corp., 1998 ABCA 196 at para 4.

[20] Duke Energy Corporation v. Duke/Louis Dreyfus Canada Corp., 1998 ABCA 196 at para 4.

[21] *Kriaski v. Kriaski*, 2015 ABQB 730 at para 2-4.

Practice tips

If no Statement of Claim or Claim was ever filed and only an application is required, it may be worth considering an Originating Application.

Rule 6.3(3) also requires service not only upon all parties, but also upon "every other person affected by the application". For example, if a child has been residing primarily with grandparents, then they should be served notice in addition to the parents, although they need not necessarily be made parties.

It may be beneficial in every Notice of Application to seek a shortening of the notice period pursuant to Rule 13.5(2), even if it is likely that the document will be served within the timelines. That way if there are any service issues and the matter is urgent, it will still be permissible to request that the matter be heard.

Sufficient length of notice may not be an issue if the opposing party is present and prepared to proceed. Not every respondent needs an Affidavit if the facts they require are set out in the Applicant's Affidavit.

Ex parte applications are useful where there is a risk that the other party will take retaliatory action, for example where there is a history of violence or they might dispose of property if a preservation order is sought. Subsequent judges may be less likely to interfere with the *ex parte* order if the original hearing judge was informed of all material facts.

In Edmonton and Calgary, regular Chambers is available on every day, subject to capacity, judicial conferences, and holidays. In Edmonton, regular Chambers is available at either 10:00 a.m. or 2:00 p.m., and morning dates have continued to reach capacity sooner. In Red Deer, regular Chambers only occurs on Monday, Wednesday, and Friday mornings. Duty Justices may be available to hear urgent matters outside of regular sittings.

[22] *Konashuk v. Wayland*, 2015 ABCA 196.

BRIEF CONFLICT INTERVENTION

Law

Brief Conflict Intervention is similar to an Intervention through a psychologist, however there is no cost to a BCI where either party earns less than $40,000.00 per annum. Parties must agree to the process, there must be at least one child of the marriage, the parties must have attempted mediation first, and they must have no active child intervention or family violence issues before the Court.

The parties can either apply for the service themselves, or be directed to attend by the Court. The Court cannot force the program to accept persons who do not otherwise qualify.

During the BCI, the specialists may:

a) Conduct parent, parent-child and child sessions;
b) Discuss a child's developmental needs and abilities;
c) Review the importance of quality parent-child relationships;
d) Discuss the adverse effects of parenting conflict on a child's development;
e) Explore family and individual strengths;
f) Examine problem-solving skills and conflict resolution styles;
g) Help resolve identified issues and draft a parenting agreement; and
h) Explore further options to assist the participants.

Practice tips

BCIs are an excellent resource where either party has sufficiently low income and they are experiencing parenting difficulties.

Orders should state: "The parties shall apply for Brief Conflict Intervention within _____ days, and if accepted they shall attend the scheduled appointments."

BCI is available in at least Edmonton and Calgary.

See https://www.alberta.ca/support-parenting-apart.aspx

BUSINESS EXPENSE DISCLOSURE

Law

Sections 19(1)(g) and 19(2) of the *Federal Child Support Guidelines* permit courts to add back business expenses if they are unreasonable deducted, and clarifies that whether or not the deduction is unreasonable is not solely governed by whether the deduction would be permitted under the *Income Tax Act*. For example, where amortization relates solely to a past expenditure, with no ongoing loan payments, and there is no concrete intent to replace the amortized asset, amortization should generally be added back to guideline income. Expert evidence is not necessarily required to determine whether an expenditure is reasonable, courts can look at supporting documentation or deduct a percentage based on what is deemed an appropriate estimate, and courts can employ common sense in this analysis.[23]

Both a Notice to Disclose Application and section 21 of the *Child Support Guidelines* require persons with business interests to provide a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length.

In 2016, the Honourable Madam Justice D.A. Yungwirth suggested that the following would satisfy this disclosure requirement:[24]

1. a brief explanation concerning each payment category, including:

    a. the nature of the payment/expense;

    b. how it was calculated;

    c. why it was a reasonable corporate expenditure;

    d. whether any amounts paid or owing in relation to that category provided or resulted in a personal benefit to the shareholder or other non-arm's length person (common examples of such expense categories in closely held corporations are

[23] *Sweezey v Sweezey*, 2016 ABQB 131 at para 51.

[24] *Sweezey v Sweezey*, 2016 ABQB 131 at para 48.

vehicle, travel, promotion, phone, and insurance). This would include an explanation for:

i. what portion of the total expense formed the personal or non-arm's length benefit;

ii. how this was calculated;

iii. a description of any services performed for the corporation by a non-arm's length person (such as a new partner/spouse of the shareholder), and information regarding whether the salary s/he was paid for the services was commensurate with the market value of the services; and

2. documentation to support all of the above explanations, such as invoices and receipts regarding non-arm's length payments.

Prior to 2016 and outside of Alberta, most reported decisions held that there is an initial onus on the non-shareholder to adduce some evidence that an expense is unreasonable, or at least a notice requirement, and then the onus shifts to the shareholder to establish reasonableness.[25]

In January 2017, our Court of Appeal in *Cunningham v Seveny* reversed the tide to state that the non-shareholder is not required to establish a prima facie case.[26] Instead, the evidential and persuasive onus "rests with the self-employed or corporate parent throughout".[27] Unfortunately, *Cunningham* made no reference to *Sweezey*, or whether Justice Yungwirth's suggested guideline would be satisfactory. However, as of the date of this paper *Cunningham*, has only been interpreted by one reported decision, *Zdyb v Zdyb*, which was satisfied by the form of disclosure set out in *Sweezey*.[28] *Zdyb* also clarified that this disclosure is required under any child support application

[25] *McCaffery v Dalla Longa*, 2008 ABQB 183 at paras 237-243 [Tab 16]; *Wildeman v Wildeman*, 2014 ABQB 732 at paras 33-34; *Homsi v. Zaya*, 2009 ONCA 322 at paras 27-28; *Berta v. Berta*, 2015 ONCA 918 at paras 62-64; *Lo v. Lo*, 2011 ONSC 7663 at paras 55-59; *Bekkers v Bekkers*, [2008] OJ no 140 (Sup Ct Just) at paras 19-20; *Halliwell v Halliwell*, 2016 ONSC 182 at para 78; *Joy v. Mullins*, 2010 ONSC 1742 at paras 34-35; *Rogers v. Rogers*, 2013 ONSC 1997 at para 46; *Sobiegraj v. Sobiegraj*, 2014 ONSC 2030 at paras 64-68; *Monney v Monney* (1999), 133 Man R (2d) 302 (QB) at para 6; *Rush v. Rush*, 2002 PESCTD 22 at paras 20-21; *Aten v. McKenna*, 2004 CarswellPEI 122 (TD) at para 13; approach taken in *Goett v Goett*, 2013 ABCA 216 at para 21.

[26] *Cunningham v. Seveny*, 2017 ABCA 4 at para 26.

[27] *Cunningham v. Seveny*, 2017 ABCA 4 at para 28.

[28] *Zdyb v. Zdyb*, 2017 ABQB 44 at para 50.

under either the *Family Law Act* or the *Divorce Act* because of section 21, as well as along with a response to any Notice to Disclose Application (presumably within the Disclosure Statement).[29] *Zdyb* also speculates that the degree of disclosure will depend on a number of factors, the most important being the degree of control exercised.[30] In any event, it is clear that a letter from an accountant stating that expenses have been treated in accordance with CRA principles will not suffice.[31]

A question remains as to whether or not supporting documentation is also required, as set out in item 2 of *Sweezey's* suggested format. In some cases, such documentation could encompass multiple banker's boxes of documents. In *Zdyb*, which otherwise endorsed *Sweezey*, the Honourable Mr. Justice R.A. Graesser provides an example which states "The corporation expensed $9,939 relating to automotive expenses incurred relating to the shareholder's 2015 Ford F-150 truck. The expenses included costs for gas, oil, maintenance and repairs, insurance, licencing and depreciation. The expenses claimed represented a 50/50 split of the expenses between business and personal use which represents my best reasonable estimate. Personal use has been factored into the amount of expense charged to the corporation. Receipts and invoices will be produced if requested."[32] As *Cunningham* was a recent decision at the time that this Manual was written, new cases will likely add to the jurisprudence on this issue in the near future.

Cunningham also stated that the Statement/Breakdown must include a sufficient explanation to facilitate the recipient's assessment of the reasonableness of these payments or benefits in the context of determining income available.[33] "The content of required disclosure must be sufficient to allow meaningful review by the recipient parent, and must be sufficiently complete and comprehensible that, if called upon, a court can readily discharge its duty to decide what amount of the disclosing parent's annual income fairly reflects income for child support purposes".[34] *Cunningham* also went one step further than *Sweezey*, to state that if a person is of the opinion that there was no personal benefit to any given expense, they must explain why those expenses or part of them should not be attributed.[35] It was also stated that "the court must balance the business

[29] At para 46.

[30] At para 47.

[31] *Zdyb v. Zdyb*, 2017 ABQB 44 at para 48.

[32] At para 59.

[33] At para 23.

[34] At para 27.

[35] At para 25.

necessity of an expense against the alternative of using that money for child support".[36] Furthermore, this disclosure obligation is stated to continue throughout the child support proceeding.[37] However, *Cunningham* provided some relief by stating that where a person only has a partial interest, they could have a managing partner or similar entity provide a letter confirming that expenses conferred no personal benefit.[38] *Cunningham* also confirmed that the level of scrutiny that is justified will be commensurate with the level of control the disclosing parent has over the business entity's overall financial choices.[39]

Failure to disclose could result in an adverse inference being drawn which results in imputation, an inability to establish that payments are reasonable, or an order for disclosure (followed by stricken pleadings, contempt, a hearing, an adverse inference, or costs on a full indemnity basis).[40]

Practice tips

The obligation to establish the reasonableness of expenses contrasts starkly with the new Practice Note 2's affidavit and exhibit page limits. Some potential options for dealing with this limitation include:

1. Applying for leave to file a longer affidavit or more exhibits;
2. Including a lengthy breakdown and supporting documentation in the Disclosure Statement;
3. Applying for a summary trial, so that the page limits no longer apply; or
4. Obtaining an expert's report, in some circumstances.

A template of a Statement/Breakdown based on *Sweezey* is attached to this paper, which also includes an example page with additional instructions. This can be provided to the client or directly to their bookkeeper or accountant. Their bookkeeper is more likely to have knowledge of these expenses. Note however that accountants and bookkeepers are not required to assist, some will state that they do not provide any services relating to the court. The only way to compel them to assist is as a witness at trial. It may also be possible to determine these expenses by reviewing the

[36] At para 27.

[37] At para 26.

[38] At para 34.

[39] At para 34.

[40] *Federal Child Support Guidelines*, sections 22-24; *Sweezey v Sweezey*, 2016 ABQB 131 at para 52.

business's general ledger, or by working backwards and questioning your client about expenses which might be personal in nature. It can also be helpful to speak to bookkeepers over the phone to explain the Statement/Breakdown, so that they are not overwhelmed, and to avoid scenarios where a bookkeeper states that they are working on such a breakdown, and then near or after the affidavit deadline announces that they do not assist with court forms.

Deductions which often have a personal benefit component include vehicles, computers, cell phones, travel, entertainment and promotional expenses, expense accounts, home office deductions, life insurance, travel, meals, entertainment, and insurance. In each case, the circumstances and nature of the payment will need to be examined.

Although the permissibility of business expense deductions is beyond the scope of this paper, it is critical to note that although amortization often relates to a past expenditure, only the interest portion of loans and mortgages can be claimed as an expense.[41] That means that the principal (non-interest) portion of any loan or mortgage payments will not appear as an expense in the Financial Statements. Amortization should not be added back without some recognition for the principal portion of any associated loan or mortgage payments if any such debts exist. For example, if amortization is $10,000 per annum, the Financial Statements show an interest expense of $1000 per annum in relation to the amortized assets, and the actual loan payment towards that asset is $8000 per annum, that means that $7000 per annum is the principal portion, and only $2000 of amortization should be added back to income, unless another factor applies, such as replacement.

Note that as a "*quantum meruit*" approach can be taken to determine a shareholder's income to be an amount commensurate with services provided, it can be beneficial to include information about average salaries in any given industry, such as from Alberta' OCCinfo service, located at http://occinfo.alis.alberta.ca/occinfopreview/info/browse-occupations.html

See also "Imputing Income" at page 59 of this Manual.

[41] *Income Tax Act*, s 20.

CASE CONFERENCES AND PRE-TRIAL CONFERENCES

Law

Case Conferences in the Court of Queen's Bench are governed by Family Law Practice Note 3 and Rule 4.10. Pursuant to a Notice to the Profession dated December 7, 2010, Case Conferences must be held prior to a trial if either of the parties is a self-represented litigant, and the matter is to be heard in Drumheller, Fort McMurray, Grande Prairie, High Level, Hinton, Peace River, or St. Paul, unless waived by the Court.

Pre-trial conferences must occur prior to trials in the Edmonton Provincial Court. They are very similar to case conferences.

For a Case Conference, summary forms must be exchanged by counsel at least 7 days in advance of the conference, and submitted directly to the Conference Justice at least 4 days prior to the conference. A precedent can be fund under item C in Practice Note 3. If clients will be present, counsel must advice the other counsel, and the conference shall not be held in private chambers.

Practice tips

Usually a one-time meeting with a judge to determine the procedure required to move a matter forward to resolution.

Case Conferences can determine what steps are required prior to trial, address disclosure issues, determine whether settlement is possible, determine admitted facts, and address various trial issues such as which issues will be heard, the number of witnesses, the amount of time required, the method of entering exhibits and financial information, the exchange of expert reports and updating of any opinions, and whether a further conference should be held.

By agreement, the case conference justice can be the trial judge, although this may be inadvisable where there may be discussions of settlement. Likewise, a specific justice can be requested to conduct the Case Conference.

CASE MANAGEMENT

Law

Case Management is usually ordered by the court. However, either party, or the parties jointly, may pursuant to Rule 4.12 send a request in writing to the Chief Justice describing the reasons for desiring Case Management, the type of file (eg high conflict parenting, disclosure issues, complex corporate issues), and whether any of the other parties agree with the request.

Pursuant to Rule 4.13, the Chief Justice may order case management for one or more of the following reasons:

a) to encourage the parties to participate in a dispute resolution process;
b) to promote and ensure the fair and efficient conduct and resolution of the action;
c) to keep the parties on schedule; and/or
d) to facilitate preparation for trial and the scheduling of a trial date.

The case management judge, or any other judge if the circumstances request, may pursuant to Rule 4.14(1):

a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute,
b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it,
c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding,
d) make an order to promote the fair and efficient resolution of the action by trial,
e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial,
f) make any procedural order that the judge considers necessary, or
g) as a case management judge, exercise the powers that a trial judge has by adjudicating any issues that can be decided before commencement of the trial, including those related to the admissibility of evidence, expert witnesses, admissions, and adverse inferences.

Once a case management justice has been appointed, unless directed otherwise, Rule 4.14(2) requires that all interim applications must proceed before that same justice. The case management

justice's decisions are binding throughout trial through Rule 4.14(3), unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

Rule 4.15 provides that the case management judge must not hear the trial or a summary trial unless consent of all parties is obtained.

Practice tips

Case Management permits a judge to take a personal interest in a matter so as to help to ensure that the matter proceeds to a resolution, oversee whether parties comply with directions over time, and oversee the results of changes to circumstances such as parenting time/conditions.

Case Management is most useful where there is frequent conflict, a dynamic situation, a self-represented litigant, or a matter which requires additional assistance in proceeding to trial.

After each Case Management meeting, the next meeting is often scheduled, until there is either stability or the matter is prepared for trial.

If the Case Management justice is unavailable and there is an urgent issue, their assistant can be contacted to obtain additional dates or leave to bring the matter in front of a different justice.

CERTIFICATE OF LIS PENDENS (CLP)

Law

A Certificate of Lis Pendens can be registered against land, so as to notify subsequent transferees/purchasers of your interest. They are authorized by section 35 of the *Matrimonial Property Act*.

If a CLP is registered before a writ, the CLP has priority, however if the CLP is registered after writ proceedings are already underway, all of the writs will have priority.[42]

[42] *Singh v. Mangat*, 2016 ABQB 349 at para 122-124.

Not all agreements actually create interests in real property capable of sustaining a CLP, there must be an "underlying claim to the real property", even if an equalization payment is not yet paid.[43]

Practice tips

If a CLP is not sustainable, you could seek that the land be considered security for costs, and request that the CLP be permitted to remain until such application can be heard.

Although CLPs are typically filed against property in which your client is not a registered owner, CLPs may also be filed against joint property where the opposing party is at risk of collection proceedings, so as to maintain priority over their half of the property.

CONTEMPT

Law

Rule 10.52 permits the Court to declare a person in contempt of the Court, for any of the following reasons:

a. the person, without reasonable excuse,
    i. does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,
    ii. is before the Court and engages in conduct that warrants a declaration of civil contempt of Court,
    iii. does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the Court to show cause why the person should not be declared to be in civil contempt of Court,
    iv. does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the person is ordered by the Court to answer,

[43] *Rosam Holdings Ltd v. Libin*, 2015 ABCA 110.

v. is a witness in an application or at trial and refuses to be sworn or refuses to answer proper questions, or

vi. does not perform or observe the terms of an undertaking given to the Court,

or

b. an enactment so provides.

Except in the case of misconduct in court, or a witness who refuses to be sworn or answer proper questions, Rule 10.52(1) requires that notice of the application be made using Form 27. Notice must be served in the same manner as a commencement document. For individuals, or a litigation representative, Rule 11.5 would require either personal service, or courier or registered mail which is acknowledged in writing. Alternatively, Rule 11.6 permits counsel of record to accept service in writing. Rule 10.51 permits the Court to grant an Order in Form 47 requiring a person to appear in court, or order a peace officer to apprehend the person and bring them before the court, to show cause that they should not be declared to be in contempt. This is referred to as a "show cause hearing".

Because of the serious consequences, the burden of proof is beyond a reasonable doubt of an intentional act or omission that is in breach of a clear order of which the person had notice.[44] Each of the following three elements need to be proven beyond a reasonable doubt: presence of a court order, knowledge of that court order, and breach of that court order.[45] Not intention to disobey, which goes to penalty. The onus is then on the accused to establish an excuse.

Punishment is set out in Rule 10.53, which includes imprisonment until contempt is purged, imprisonment for not more than 2 years, a fine and up to 6 months' imprisonment in default of payment, an order to strike affidavits or pleadings, a stay of application or action, dismissal, judgment or an order be entered, or a record be prohibited from being used, and a costs award.

In *Family Law Act* matters, a separate set of relief is set out at sections 40(2) and 41, which includes compensatory parenting time, reimbursement of actual expenses arising as a result of a denial of parenting time, reimbursement for any necessary expenses incurred as a result of a person failing to

[44] *Serhan (Estate of) v Bjornson*, 2001 ABCA 294 at para 11; *Carey v Laiken*, 2015 SCC 17, [2015] 2 SCR 79 at para 38.

[45] *Bains Engi-neering Corp v 734560 Alberta Ltd*, 2004 ABQB 780 at paras 7-8, aff'd 2005 ABCA 187.

exercise parenting time, penalties not exceeding $100 for each day that there has been a denial of time to a maximum of $5000, imprisonment for a term not exceeding 90 days, a police enforcement clause, or anything else that the court considers appropriate in the circumstances that is intended to induce compliance with a parenting time clause.

Police enforcement clauses are authorized by the June 1, 2010 Consolidated Notices to the Profession, at page 24, which provides the following precedent:

> "If either of the parties or any other person on their behalf, breaches any of the terms of this Order, then a Peace Officer shall provide assistance to ensure that the offending party complies with its terms. Before enforcing the terms of this Order, a Peace Officer must first ensure that the party has been served with a copy of this Order. If not served, the party must be shown a copy of the Order by the Peace Officer and be given a reasonable time to comply with its terms. If the party fails or refuses to comply with this Order, the Peace Officer shall do such lawful acts as may be necessary to give effect to its terms including, if necessary, arrest, detain and bring the party at the earliest possible time before a Justice of the Court of Queen's Bench to show cause why the party should not be cited for civil contempt."

Although a person cannot be imprisoned for inability to pay, a flagrant breach of an order by not paying anything can be sufficient to imprison.[46]

Solicitor-client privilege cannot be used to shield contempt of court.[47]

Several decisions in Ontario have stated that contempt is a last resort which shouldn't be granted in family law applications where other adequate remedies are available.[48]

Breaching an Order on its own does not create a civil cause of action.[49]

If new evidence comes to light, that wasn't previously available, then contempt proceedings can be reopened.[50]

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[46] *Mella v. 336239 Alberta Ltd. (Dave's Diesel Repair)*, 2016 ABCA 226 [3 months].

[47] *Carey v Laiken*, 2015 SCC 17.

[48] *Fiorito v. Wiggins*, 2015 CarswellOnt 16481 (Ont CA); *Hefkey v Hefkey*, 2013 ONCA 44, 30 RFL (7th) 65, at para. 3.

[49] *MacDonald & Freund v Haljan*, 1996 ABCA 387 at para 12.

[50] *Carey v Laiken*, 2015 SCC 17 at para 62.

Good faith criticism of judicial institutions and their decisions is not contempt.[51]

Practice tips

Contempt is rarely granted. Often before contempt being ordered, a person is given an opportunity to purge their contempt. Where contempt involves a failure to produce documents, inferences can instead be made, particularly pursuant to section 23 the *Federal Child Support Guidelines*. In extreme cases, where the contempt involves repeated failure to abide by an order mandating parenting time, courts have sometimes granted the wronged parent custody.

Rule 10.53(3) provides that the Court can waive or suspend any penalty or sanction where a person "purges" their contempt. This means that not only should a respondent take steps to not be in contempt after being served with an application or put on notice that they have breached, they can later seek to remove a penalty for correcting their actions. Rule 10.53(4) also permits an application on notice to increase, vary, or remit the penalty or sanction.

COSTS

Law

Generally, the unsuccessful party must pay costs forthwith, pursuant to Rule 10.29(1). Although costs are usually with reference to Schedule C to the Rules, the Court maintains discretion as to the amount awarded.[52] However, that discretion must be based on principle.[53] For family law matters such as divorce and child support, column 1 has been used as a presumptive starting point, however for matrimonial property division that presumption does not apply, instead the appropriate column should be utilized.[54] Costs in matrimonial matters or parenting matters should not be treated differently.[55]

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[51] *Morasse v. Nadeau-Dubois*, 2016 SCC 44.

[52] Rule 10.31(3)(a); *Hill v Hill Family Trust*, 2013 ABCA 313 at para 38.

[53] *MacFarlane v. MacFarlane*, 2016 ABCA 183 at para 22.

[54] *Smith v Smith*, 2016 ABQB 291 at para 10; *Katrib v Katrib*, 2008 ABQB 162 at paras 25 and 26.

[55] *Cador v Chichak*, 1998 ABQB 881 at para 9; *KCM v BTM*, 2015 ABQB 502 at para 26; *Metz v. Weisgerber*, 2004 ABCA 151 at paras 34, 35, 47.

If the court does not determine the amount of costs, either party can request an appointment date with an assessment officer, pursuant to Rule 10.30(2).

Pursuant to Rule 10.33(1), in making a costs award, the court may consider all or any of the following:

a) the result of the action and the degree of success of each party;
b) the amount claimed and the amount recovered;
c) the importance of the issues;
d) the complexity of the action;
e) the apportionment of liability;
f) the conduct of a party that tended to shorten the action;
g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

Pursuant to Rule 10.33(2), in deciding whether to impose, deny or vary an amount in a costs award, the court may consider all or any of the following:

a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
b) a party's denial of or refusal to admit anything that should have been admitted;
c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
f) a contravention of or non-compliance with these rules or an order;
g) whether a party has engaged in misconduct.

The Rules also permit the imposition of penalties, which can even be awarded against a successful party, usually for contravention of Rules.[56]

[56] Rule 10.49(1); *KCM v BTM*, 2015 ABQB 502 at para 32.

Solicitor-and-client costs are rare, but possible. For example, in *Liboiron v. Liboiron*, 2008 ABCA 367, solicitor-and-client costs were upheld where the payee refused to reduce spousal support following the payor's disability.

Pursuant to Rule 10.31(2)(d), costs generally don't include an expert's fees, and pursuant to Rule 10.31(2)(c) costs generally do not include dispute resolution or JDR costs unless a party engaged in serious misconduct.

Pursuant to Rule 10.31(5), self-represented litigants are only entitled to costs in appropriate circumstances.

Costs may also be awarded in the Provincial Court on the conditions the Court considers appropriate.[57]

Practice tips

The Court of Queen's Bench publishes a Costs Manual, which is used as a guide for Clerks who tax bills of costs. In addition to illuminating their procedures, the Manual also includes references to many court cases, and how to address common disbursements. For example, photocopying is generally reimbursed at a maximum of 15 cents per page. Parking and travel expenses are generally not permitted for in-town counsel. Reasonable costs for tabs are allowed where they cannot be reused. A disbursement to an agent will be disallowed if performing legal services already compensable under Schedule C. The cost for official transcripts is allowable. The cost of mediation is not a recoverable expense. Postage for the purpose of being a party to a proceeding is generally allowable. The cost of process servers is generally allowed, to a reasonable extent. Court Runner's fees are generally not allowable. Disbursements for private investigators are sometimes allowed. The version updated January 17, 2011 can be found here, which addresses these issues in much more detail: https://albertacourts.ca/docs/default-source/default-document-library/disbursements-(january-2011).pdf?sfvrsn=0

Costs for dispute resolution or JDR are generally not recoverable unless a party engages in serious misconduct during the process, due to Rule 10.41(2)(d).

[57] *Family Law Act*, s 93; *Provincial Court Procedures (Family Law) Regulation*, s 10(1); *Provincial Court Act*, s 8; see *K.K.E. v. R.M.H.*, 2016 ABPC 188, where enhanced party/party costs were awarded under Column 3.

Experts' costs are disallowed by assessment officers, however the Court can order that an expert's fees be apportioned or recoverable, due to Rule 10.41(2)(e). However in any event, the expert is still permitted a witness allowance for attending trial, summary trial, or Questioning.

Those holding Legal Aid certificates are exempt from paying fees to initiate actions, set matters for trial, and appeal notices or for leave to appeal, in which case they cannot recover those fees.

See "Security for Costs" at page 97 of this Manual.

COURSES (PAS, PASHC, FOCIS)

Law

Practice Note 1 requires that parties to applications where child support, custody, access, parenting or contact are at issue must complete the Parenting After Separation (PAS) in person seminar or online seminar, and must complete same within 3 months of the filing of the Statement of Claim. No application for interim support, custody, parenting, or contact may be filed where there are children under the age of 16 years and a PAS certificate has not been filed. There are exceptions in the cases of domestic violence, abduction, unilateral change of the de factor parenting arrangement, upon proof of registration in a class occurring within two weeks of filing, online seminar initiated, or in rare circumstances upon application.

Practice Note 7 permits the Court to order that parent(s) attend educational sessions, which are stated to include Parenting After Separation (PAS), High Conflict Parenting After Separation (PASHC), and Focus on Communication in Separation (FOCIS), "to assist the parents to understand the needs of their children, the roles of parents or other caregivers' and negative impacts on children of prolonged conflict". As the list is non-exhaustive, this could include further education. Furthermore, nothing comes to mind which would prevent a court from ordering further education through a Rule 1.4 procedural order or as a condition of parenting time.

In *Family Law Act* matters, courts may order the parties to attend any course or program that is appropriate in the circumstances, including any course or program offered through the Minister of

Justice, Solicitor General, or any community or government agencies pertaining to separation or guardianship and parenting of children.[58]

Practice tips

It is often useful to have parties attend additional courses, especially in the case of self-represented litigants. The typical courses ordered by the courts are Parenting After Separation (PAS) (which also has a legal education component relating to parenting, child support, and alternative dispute resolution), High Conflict Parenting After Separation (PASHC), and Focus on Communication in Separation (FOCIS). All of these courses are free. In Edmonton, they are offered through The Family Centre.

Courts have also on occasion ordered other types of education, such as education focusing on developing proper parenting skills. In Edmonton, a variety of parenting skills courses are also offered by The Family Centre.

Although PAS is now offered online, it may be preferable to have clients attend in person sessions, to help to ensure that they are paying attention, and because it provides them with an opportunity to ask a psychologist and lawyer questions at no charge. As a disclaimer, the writer is a PAS instructor through The Family Centre.

DELAY

Law

Rule 4.1 makes the parties responsible for managing their dispute and for planning its resolution in a timely and cost-effective way. Rule 4.2 specifies additional requirements.

Rule 4.4 generally obliges parties in standard cases to complete steps within a reasonable time considering the nature of the action, including the close of pleadings, the disclosure of information under Part 5, and the application for a trial date.

[58] *FLA*, s 98; *Family Law Act General Regulation*, Alta Reg 148/2005, s 5.

Rule 1.4(1) can be utilized to grant any order with respect to practice or procedure with respect to any action or application. Rule 1.4(2) provides further relief, such as the ability for the Court to impose terms, conditions, and time limits, and to "give advice, including making proposals, providing guidance, making suggestions and making recommendations".

Practice tips

See "Drop Dead Rule" at page 36 of this Manual.

See "Litigation Plans" at page 68 of this Manual.

See "Case Conferences and Pre-Trial Conferences" at page 24 of this Manual.

DISCLOSURE

Law

In uniquely vulnerable circumstances, there is a duty to make full and honest disclosure of all relevant financial information, otherwise courts may intervene where the result is substantially at variance from the objectives set out in the relevant legislation.[59]

Even where a Notice to Disclose is not brought, section 21 of the *Child Support Guidelines* requires that some documents be exchanged. Clerks have been directed to enforce this requirement through Disclosure Statements, pursuant to the Court of Queen's Bench's Section 21 Disclosure Initiative, set out in the Notice to the Profession and Public dated May 19, 2016.

Even outside of criminal matters, similar fact evidence can still be compelled.[60]

The right to privacy is subject to, and does not take precedence over, the right of the public to an open court process.[61]

[59] *Rick v Brandsema*, 2009 SCC 10 at para 47.

[60] *Kaddoura v. Hanson*, 2015 ABCA 154 at paras 12-14.

[61] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

Practice tips

If clients decline to exchange full financial disclosure, their lawyer should have them sign a written waiver.[62]

Precedent Disclosure Statements can be found at http://www.familycounsel.ca/

For files involving business interests, the comprehensive breakdown and supporting documentation in relation to business expense deductions and non-arm's length parties could probably be included in Disclosure Statements. See "Business expense disclosure" at page 19 of this Manual.

Although an Affidavit of Records is not necessarily required in family law files unless they proceed to trial, either party can serve a Notice to Produce an Affidavit of Records pursuant to Rule 12.38(2), which requires an Affidavit of Records be produced within 3 months. This can be used to force the opposing party to provide their documentation where you suspect that they may not possess sufficient evidence, especially if they have an onus to meet, for example in the case of exemptions or certain business expenses.

See "Affidavit of Records" at page 10 of this Manual.

See "Business Expense Disclosure" at page 19 of this Manual.

See "Notice to Disclose" at page 76 of this Manual.

See "Third Party Documents" at page 120 of this Manual.

DROP-DEAD RULE, AND INORDINATE DELAY

Law

It is a basic principle that the Plaintiff bears the ultimate responsibility for prosecuting their claim in a timely manner.[63] A defendant, while never required to actively move the plaintiff's action along, cannot purposively obstruct, stall, or delay the action.[64]

[62] *Webb v. Birkett*, 2011 ABCA 13 at para 54.

[63] *XS Technologies*, 2016 ABCA 165 at para 7; *Lethbridge Motors Co v American Motors (Canada) Ltd* (1987), 1987 ABCA 150, 79 AR 321 (CA) at para 19; *Flock v. Flock Estate*, 2017 ABCA 67 at para 17(4).

The **drop-dead rule** is contained in Rule 4.33. It states that where three or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant. The rule is mandatory, it does not allow for the exercise of discretion.[65] The only exceptions are:

1. Where the applicant agreed to the delay.
    - This is referred to as a **standstill agreement** or tolling agreement.
    - The essential elements of a standstill agreement are:[66]
        a. Identities of the parties to the contract;
        b. When the standstill began; and
        c. The essential terms.
    - It's prudent practice to use the words "standstill agreement" and refer to Rule 4.33(1)(a), but not necessary.[67]
    - A "formal" agreement is not necessary so long as the other requirements are met.[68]
    - The agreement must be "express", but can be written, oral, or both.[69] The agreement could even be reflected in an exchange of correspondence.[70] However, it cannot be based solely on intent or inference, and cannot be implied.[71] "Express" is defined as "Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference… Manifested by direct and appropriate language, as

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[64] *Janstar Homes Ltd v Elbow Valley West*, 2016 ABCA 417 at para 26; Flock v. Flock Estate, 2017 ABCA 67 at para 17(4).

[65] *Morasch v Alberta*, 2000 ABCA 24 at para 5.

[66] *Bugg v Beau Canada Expiration Ltd*, 2006 ABCA 201 at para 8-9; *Brian W. Conway Professional Corp. v. Perera*, 2015 ABCA 404; *Craig v Blue Cross Life Insurance Co of Canada (c.o.b. Ontario Blue Cross)*, 2010 ABQB 659 at para 10.

[67] *Brian W. Conway Professional Corp. v. Perera*, 2015 ABCA 404 at para 32.

[68] *Canadian Egg Marketing Agency v Villetard*, 2005 ABCA 294 at para 5.

[69] *Canadian Egg Marketing Agency v Villetard*, 2005 ABCA 294 at para 6; *Bugg v Beau Canada Exploration Ltd*, 2006 ABCA 201 at para 18.

[70] *Craig v Blue Cross Life Insurance Co of Canada (c.o.b. Ontario Blue Cross)*, 2010 ABQB 659 at para 10; *Canadian Egg Marketing Agency v Villetard*, 2005 ABCA 294 at para 5.

[71] *Bugg v Beau Canada Exploration Ltd*, 2006 ABCA 201 at para 18; *Craig v Blue Cross Life Insurance Co of Canada (c.o.b. Ontario Blue Cross)*, 2010 ABQB 659 at para 10.

distinguished from that which is inferred from conduct. The word is usually contrasted with implied."[72]

- A defendant's request that no further steps be taken while the parties undertake resolution efforts can be a standstill agreement or an extension.[73]
    - However, an open-ended request to not take any further steps or for time to file without specifying any timeline is not a standstill agreement, there must be a timeline or temporal boundary when the agreement is made, although an exact date is not required, it could be the time to complete a task.[74] For example, asking for a "few weeks" to defend, will only extend the three-year period by a "few weeks".[75]
    - There might be an exception is a request is made and then the drop dead application is brought immediately afterwards.[76] A reasonable time must elapse after such an open-ended request before a drop dead application may be filed.[77]

2. If the delay is attributable to a court order: where the action was stayed or adjourned by an order, a suspension period had been ordered, or the delay is provided for in a litigation plan;[78] or

3. An application has been filed or proceeding have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.[79]

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[72] *Bugg v. Beau Canada Exploration Ltd.*, 2006 ABCA 201.

[73] *Craig v. Blue Cross Life Insurance Company of Canada*, 2010 ABQB 659; *Danek v. Calgary (City)*, 2006 ABQB 807 (Master); *Sinnott v. Canadian Pacific Railway Company*, 2010 ABQB 185.

[74] *Servus Credit Union Ltd. v. BRB Building Corp.*, 2016 ABQB 428 at para 59; *Charik Custom Homes Ltd. v. Sara Development Inc.*, 2014 ABQB 63 (Master).

[75] *Barcellona v. Einarson*, 2012 ABQB 56 (Master).

[76] *Servus Credit Union Ltd. v. BRB Building Corp.*, 2016 ABQB 428 at para 58.

[77] *Co-operators Life Insurance Co. v. Rollheiser*, 1998 ABQB 874; *Danek v. Calgary (City)*, 2006 ABQB 807 (Master); *Turek v. Oliver*, 2014 ABCA 327.

[78] Rule 4.33(2)(a).

[79] Rule 4.33(2)(b).

- A party may lose their right to dismiss if they've gone along with the other's actions, acquiesced to the delay, participated in the action, or failed to expeditiously bring the dismissal application.[80]
- This is because Rule 4.33 is not designed to encourage an ambush.[81]
- The purpose if this exception is to address situations where defendants have actively participated in an action to the extent and degree that could lead a plaintiff to believe the defendant has waived the delay.[82]
- The right is lost if Rule 4.33 is not enforced in a timely basis.[83]

There is no duty on an applying party to advise that it does not acquiesce to the delay, or give notice in advance of a drop dead application that it will be applying to dismiss.[84]

Where the application is unsuccessful, the Court may grant any other procedural order it considers appropriate.[85]

The three year period does not include the period of time between service of a Statement of Claim and service of the applicant's Statement of Defence, and the period of one year after the date of service of a Statement of Claim on an applicant.[86] The three year period also does not include a period of suspension agreed to in writing. The three year period may also be extended where the applicant did not respond to a written proposal by the respondent that the next step occur after the period.

The timelines are in regard to the date the application was filed, not heard.[87]

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[80] *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259 (at para 28-29); *Jondreau v MacLean*, 2006 ABQB 265 (at para 30); *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 (at para 36).

[81] *Turek v Oliver*, 2014 ABCA 327 at para 6.

[82] *Krieter v Alberta*, 2014 ABQB 349 at para 50; *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 at para 13.

[83] *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259 at paras 31, 33: *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 17.

[84] *Flock v. Flock Estate*, 2017 ABCA 67 at para 24.

[85] Rule 4.33(3).

[86] Rule 4.33(4).

[87] *Steparyk v Alberta*, 2014 ABQB 367 at para 5; *Flock v. Flock Estate*, 2017 ABCA 67 at para 17(8).

A party may apply for an order suspending the three year period under Rule 4.33(9).

What constitutes a step which significantly advanced the action?

- The Court must assess whether the action has advanced towards resolution in a meaningful way.[88]
- This requires a functional approach, without over-emphasizing formalistic steps.[89] Even a step mandated by the Rules requires the Court to analyze that step through the functional approach.[90]
- The Court can consider steps taken by either party.[91]
- The Court can consider "the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what has occurred".[92]
- Actions that narrow the issues, complete discoveries, or clarify the positions of the parties may significantly advance the action, depending on the circumstances.[93]
- Prejudice is irrelevant.[94]
- Some examples of steps that have been found to significantly advance the action in the circumstances include filing a Statement of Defence that clarifies positions and issues (even where it was agreed that one would not be needed),[95] disclosing important documents,[96] setting the matter for a summary trial suitability hearing, production of requested records,

[88] *Canada (AG) v Delorme*, 2016 ABCA 168 at para 27; *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at paras 14, 20; *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at para 19; *Alberta v. Cox*, 2017 ABCA 5 at para 22.

[89] *Flock v. Flock Estate*, 2017 ABCA 67 at para 17(2); *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123; *Phillips v Sowan*, 2007 ABCA 101.

[90] *Ursa Ventures Ltd v Edmonton (City)* at para 35; *Flock v. Flock Estate*, 2017 ABCA 67 pat para 17(2).

[91] *Volk v 331323 Alberta Ltd*, 1998 ABCA 54, 212 AR 64; *Jondreau v Maclean*, 2006 ABQB 265 at para 13; *Flock v. Flock Estate*, 2017 ABCA 67 at para 17(7).

[92] *Canada (AG) v Delorme*, 2016 ABCA 168 at para 27, quoting *Nash v Snow*, 2014 ABQB 355 at para 30; *Alberta v. Cox*, 2017 ABCA 5 at para 23.

[93] *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 20.

[94] *Volk v 331323 Alta Ltd,* 1998 ABCA 54 at para 16; *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 at para 13; *Flock v. Flock Estate*, 2017 ABCA 67 at para 17(9).

[95] *Brost v. Kusler*, 2016 ABCA 363 at paras 18-20.

[96] *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc*., 2016 ABCA 123.

filing affidavits of records, applying for summary judgment, or applying for production of pivotal documents.[97]

- Conversely, suggesting that the litigation be put on hold for mediation or settlement discussions without any further agreement has been found insufficient.[98]

Alternatively, an application can be brought for **inordinate delay** to dismiss all or part of a claim, or a procedural or other order, pursuant to Rule 4.31. All or part of a claim may only be dismissed where the delay has resulted in significant prejudice to a party. Where the delay is inordinate and inexcusable, the delay is presumed to have resulted in significant prejudice to the other party. When this presumption applies, the applicant need not itemize every impact of prejudice.[99] Delay is inordinate where it was in excess of what was reasonable, having regard to the nature of the issues in the action and the circumstances of the case.[100]

Practice tips

The drop dead rule does apply in the family law context.[101] There is no exception for matrimonial property actions.[102] This means that a person can lose their claim to a division of matrimonial property or unjust enrichment if they fail to advance the action in a timely manner. The drop dead rule is a significant source of liability to family law counsel, and as such files should always be properly diarized, and clients advised that they could lose their claim if they do not advance the action within the prescribed time periods.

A standstill agreement or suspension order could be appropriate for example where the parties wish to wait and see whether re-training will be successful before adjusting spousal support, the impact of a serious illness or disability, or where they are waiting for property to be sold.

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[97] *Alberta v. Cox*, 2017 ABCA 5 at paras 30-33.

[98] *Flock v. Flock Estate*, 2017 ABCA 67 at para 21; *525812 Alberta Ltd. v. Purewal*, 2004 ABQB 938.

[99] *Brace v. Williams*, 2016 ABCA 384 at para 6.

[100] *Deis v. Koch Oil Ltd.*, 2001 ABQB 997 at para 11 as cited in *Raven v. Airdrie (City)*, 2012 ABQB 74 at para 16.

[101] Rules 12.34 and 12.35; *Brost v. Kusler*, 2016 ABCA 363 at paras 9-11.

[102] *Flock v. Flock Estate*, 2017 ABCA 67 at para 31. For examples of the drop dead rule used in relation to matrimonial property issues, see *Flock v. Flock Estate*, 2017 ABCA 67, *Brost v Kusler,* 2016 ABCA 363; M*etcalf v Metcalf*, 2011 ABQB 186; *Lord v Bell-Lord*, 2007 ABQB 274; *Repas v Repas*, 2010 ABQB 569.

As failing to enforce Rule 4.33 in a timely basis can result in a loss of the right to invoke Rule 4.33, meaning that it is also important that applicants also diarize the three-year period.

In addition to seeking a procedural order to deal with delay pursuant to Rules 4.31 or 4.33(3), procedural orders may also be made under Rule 4.31.

ENFORCING AGREEMENTS

Law

Courts should be reluctant to second-guess arrangements in which spouses reasonably expected to rely.[103] Mutual promises are sufficient consideration,[104] as is a promise to marry.[105]

Agreements regarding parenting are not binding, the Court has the sole discretion.[106] However, this may not be the case where there is statutory authority or an agreement to submit to arbitration, such as through Parenting Coordination with arbitration.[107]

Agreements respecting the division of matrimonial property must satisfy the formal requirements of section 38 of the *Matrimonial Property Act* to be valid, which requires written acknowledgements with independent legal advice. Independent legal advice requires informed advice regarding the nature and consequences of an agreement, but not necessarily advice about the wisdom of entering into an agreement.[108] The *Matrimonial Property Act*'s writing requirements do not apply to unmarried parties.[109]

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[103] *Hartshorne v Hartshorne*, 2004 SCC 22 at para 36.

[104] West v Stowel (1577), 2 Leon 154, 74 ER 437

[105] *Floyer v Bankes* (1863), 3 De G J & S 306 at 312, 46 ER 654; *O'Reilly v O'Reilly* (1910), 21 OLR 201 at 208-9 (CA); *Attorney-General of Ontario v Perry*, [1933] OR 617, [1933] 3 DLR 255 at p. 259 (CA).

[106] *Stewart v Stewart* (1990) 1990 ABCA 355 at para 9; *Roebuck v. Roebuck* (1983) 1983 ABCA 156; *Cormier v. Cormier* (1984) 49 A.R. 232 at 234.

[107] *Durocher v Klementovich*, 2013 ABCA 115 at para 15; *Sport Maska Inc. v Zittrer*, [1988] 1 SCR 564 at p. 588.

[108] *Wright v. Carter* (1902), 87 L.T. 624 at paras 57-58; *Brosseau v Brosseau*, [1990] 2 WWR 34, 100 AR 15 (ABCA) at paras 22-23; *Corbeil v Bebris* (1993), 141 AR 215 (CA); *Hanson v Hanson*, 2009 ABCA 222 at para 12; *Tardif v Campbell*, 2008 ABQB 776 at para 25; *Cope v Hill*, 2005 ABQB 625 at paras 209-210.

[109] *Lemoine v Griffith*, 2014 ABCA 46 at para 28.

An agreement may be binding notwithstanding failure to comply with the strict requirements of the *Matrimonial Property Act*. An agreement may be a factor considered in the Court's determination pursuant to section 8(g) of the *Matrimonial Property Act.* This may be the case even where there is no independent legal advice.[110] In several decisions correspondence between counsel has been found to be sufficient to bind a client to a spousal support and matrimonial property settlements.[111] A matrimonial property agreement reached at judicial dispute resolution was recently found to be binding.[112] An agreement read into court may be binding, even in relation to an interim order, although a variation application upon a material change in circumstances may be feasible.[113] Unilateral promises made on the court record might be relevant pursuant to section 8(g), but are not determinative.[114]

With respect to spousal and child support, the two step test is set out in *Miglin v Miglin*, 2003 SCC 24 at paras 81-89. First, the court must consider the circumstances in which the agreement was made, whether it was negotiated fairly, and whether it conformed with the objectives of the *Divorce Act*. Then, the Court must consider the current circumstances, as in whether the agreement continues to reflect the parties' intentions, and whether there has been a significant change in circumstances that was reasonably unforeseeable at the time of formation. Although courts aren't necessarily bound by child support agreements, they are strong evidence that at the time the parties accepted that the arrangement would adequately provide for the needs of the children.[115]

It may be possible to argue that a person did not understand the terms of the agreement reached.[116]

Material inducement by misrepresentation or fraud may invalidate an agreement. However, a "whole agreement" clause, which states that the agreement replaces all other agreements, may mean that even negligent and innocent misrepresentations made outside of the agreement might not invalidate the agreement.[117]

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[110] *Kuehn v Kuehn*, 2012 ABCA 67; *Corbeil v Bebris* (1993), 141 AR 215 at para 29.

[111] *Wang v. Xu*, 2014 ABQB 691 at para 21; *Loewen v Loewen*, 2001 ABQB 467 at paras 22 to 26.

[112] *Toliver v. Koepke*, 2016 ABQB 452 at para 63.

[113] *Klimek v Klimek*, 2015 ABQB 188 at paras 28-29, 34, 35, 39.

[114] *Porochnavy v. Scheie*, 2014 ABQB 316 at paras 52 and 53 [here, regarding responsibility for debt]

[115] *Willick v Willick*, [1994] 3 SCR 670.

[116] *Klimek v Klimek*, 2015 ABQB 188, Graesser J at para 25-26.

[117] *Houle v. Knelsen Sand and Gravel Ltd*., 2016 ABCA 247.

Agreements only create in personal obligations on the parties, they do not extend to corporations, even if a party is a sole shareholder.[118]

For a discussion of undue influence and duress, see *Webb v. Birkett*, 2011 ABCA 13.

Practice tips

Agreements can be challenged on the basis of material inducement by misrepresentation, fraud, duress, undue influence, failure to comply with the *Matrimonial Property Act*, lack of independent legal advice regarding matrimonial property or spousal support, and spousal or child support pursuant to *Miglin*. Each of these tests are nuanced and require careful reading.

Often the most effective method to enforce an agreement is to apply for trial of an issue pursuant to Rule 7.1, the issue being the validity of the agreement. This may either dispose of the claim, or facilitate a settlement. See "Severance and Trial of an Issue" at page 103 of this Manual.

It is important to document a settlement. If reached at the courthouse, an agreement can be read into the record. If reached at Questioning and the reporter is still present, they can be asked to record the terms of settlement. Short-form agreements prior to formalization may be of use, but should contemplate entering into a more comprehensive formal agreement with standard terms.

EVIDENCE AND HEARSAY

Law

Four requirements must be met in order for evidence to be admissible: relevant, necessity, the absence of an exclusionary rule, and in the case of opinion evidence, a properly qualified expert.[119] This often includes a consideration of whether the evidence is more probative than prejudicial.

A layman's opinion evidence dependent upon inferences is not admissible.[120]

[118] *Rosam Holdings Ltd v. Libin*, 2015 ABCA 110.

[119] *R v Mohan*, [1994] 2 SCR 9.

[120] *Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 836.

Of particular significant to chambers practice, the rule against **hearsay** is only invoked when the court is making a final determination, hearsay may be permitted in the case of interim applications.[121] However, even in final determinations, there may exceptions to hearsay.[122]

A court can properly take **judicial notice** of facts that are either "so notorious or generally accepted as not to be the subject of debate among reasonable persons; or … capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy".[123] For example, the Court recently took judicial notice of the poor economy in 2016, which avoided the requirement for an expert to testify as to the state of the economy.[124]

Eavesdropping essentially occurs where a party records a conversation to which neither party to that conversation has given them consent to listen to that conversation. Eavesdropping is a criminal offence. However, even in cases where a party is present and **records** the conversation, many courts refuse to admit that evidence, out of concern that it will create a hostile environment and is subject to tampering, particularly in the case of audio.

Practice tips

Common objections include hearsay (but only in relation to final determinations), irrelevance, prejudicial evidence, hypothetical evidence, speculation or conjecture, opinion not provided by a properly qualified expert, litigation privilege, or commenting on a matter of law.

Hearsay evidence may be challenged in hearings where a final determination is being made. In family law, apart from a trial, this may be of particular significance in relation to applications to vary support or parenting made after a *Divorce Judgment* is rendered, or in matters where the parties were not married. Do not assume that the court is aware that hearsay is an issue, counsel should remind the presiding judge.

Layman opinions as to measurements, speeds, identity, state of mind, handwriting, and testamentary capacity are often admissible.

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[121] Rule 13.18; *Klein v. Wolbeck*, 2016 ABQB 28 at paras 12-13.

[122] *Murphy v Cahill*, 2012 ABQB 793 at paras 25-26; *Klein v. Wolbeck*, 2016 ABQB 28 at para 15.

[123] *R v Find*, 2001 SCC 32 at para 48.

[124] *Schmaus v. Schmaus*, 2016 ABQB 408 at para 5.

The law of evidence is complex and beyond the scope of this paper.

"Without prejudice" communication is not necessarily inadmissible, as discussed above, however some judges have taken the position that all letters between counsel should be excluded.

See "Striking" at page 107 of this Manual.

See "Privilege" at page 87 of this Manual.

EXCLUSIVE POSSESSION

Law

Pursuant to section 19 of the *Matrimonial Property Act* or section 68 of the *Family Law Act* for unmarried persons, the Court can grant exclusive possession, direct an eviction, or restrain a spouse from entering or attending near a home.

Section 20 of the *MPA* and section 69 of the *FLA* direct that the Court must consider the following factors:

a) The availability of other accommodations within the means of either spouse/AIP;
   - The Court may take judicial notice of the availability of rental premises in the area.[125]
   - One example could be one spouse having citizenship in another country which would allow them to reside in a foreign property, to which the other spouse would be unable.[126]

b) The needs of any children residing in the home;
   - This consideration is in relation to dependent children, for example within the definition of "children of the marriage", such as if a full-time student lives in the house.[127]

[125] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 26.

[126] *Welsh v Welsh*, 2011 ABQB 686 at para 31.

[127] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 28; *Priest v Priest*, 2011 ABQB 294 at para 22.

- Although children are a consideration, exclusive possession should not be used as a mechanism to obtain *de facto* custody where both parents have been involved with the children, instead parenting and support may need to be resolved first, and the exclusive possession application adjourned until after that time.[128]

c) The financial position of each of the spouses/AIPs;
    - Generally where there is a significant difference in incomes, and one spouse would have difficulty obtaining alternate accommodations.[129]

d) Any order made by a court with respect to the property or the support or maintenance of one or both of the spouses/AIPs; and
    - In other words, the aforementioned factors should be in light of other properties owned by the parties, and each party's earning capacity should be considered in conjunction with or following a consideration of support.

e) Under the *FLA*, the Court must also consider any restrictions or conditions of any lease involving the family home, if applicable.

Other considerations:

- Exclusive possession is still only an interim order, but the hearing judge can consider likely trial outcomes and the relative likelihood of alternative options that may arise at trial.[130]
- An expressed desire to not maintain the property can militate against possession.[131]
- A failure to pay expenses associated it the property while living there can be considered.[132] Presumably, this would be where the party had the financial means but chose not to.
- Maintaining a longstanding status quo may be a consideration, however that may not be the case where a spouse seeking possession continues to regularly attend even after vacating.[133]
- The Court should ultimately be guided by the balance of convenience in the situation.[134]

[128] *Pfeil v Pfeil*, 2009 ABQB 431 at paras 14, 16, 18.

[129] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 30.

[130] *Fletcher v. Fletcher*, 2012 ABCA 18 at para 16.

[131] *Welsh v Welsh*, 2011 ABQB 686 at para 32.

[132] *Welsh v Welsh*, 2011 ABQB 686 at para 32.

[133] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 34.

[134] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 35.

- The Court can consider a disability, making a person more financially and physically in need.[135] However, this may not be an important factor where the spouse wouldn't be able to buy-out the other spouse in any event, that the other spouse's continued presence wouldn't directly damage their health, and where there is a history of the other spouse caring for a child while the spouse undergoes treatment.[136]

A spouse generally shouldn't be removed from the home unless the living situation is impossible to tolerate.[137] However, being "sick and tired" of the other spouse isn't sufficient, an applicant seeking immediate removal should demonstrate some type of threat to the spouse and/or children.[138] On the other hand, if a spouse claims that they can't live comfortably with the other, the court may take them at their word, even if the other spouse is adamant that they can co-exist.[139]

A "matrimonial home" or "family home" is defined as being either owned or leased, by either or both spouses/AIPs, which is or has been occupied by them as their home, that is a house or part of a house that is either a self-contained dwelling unit, part of a business premises used as living accommodation, a mobile home, a condominium, or a suite.[140]

The Order can also extend to the property surrounding the home, as much as is necessary for the use and enjoyment of the home.[141] A person can also obtain exclusive possession of household goods, upon any necessary conditions.[142] "Household goods" are defined as property that is owned by either or both spouses/AIPs, which was ordinarily used or enjoyed by either or both, or any of the children residing in the home, for transportation, household, educational, recreational, social, or esthetic purposes.[143] This can even include possession of building supplies intended to be used on renovations.[144]

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[135] *Grunenwald v Grunenwald*, 2006 ABQB 186 at para 32.

[136] *EET v ANT*, 2012 ABQB 142 at para 10.

[137] *EET v ANT*, 2012 ABQB 142 at paras 11-12.

[138] *Pfeil v Pfeil*, 2009 ABQB 431 at para 15.

[139] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 24.

[140] *MPA* s 1(c); *FLA* s 67(1).

[141] *MPA* s 19(2); *FLA* s 68(2).

[142] *MPA* s 25; *FLA* s 73.

[143] *MPA* s 1(b); *FLA* s 67(2).

[144] *Boutin v Viau*, 2007 ABQB 451 at para 20.

Exclusive possession is not available in the Provincial Court, however a *Family Law Act* claim can be brought in the Court of Queen's Bench using the same Claim form and Statements, an Originating Application and Affidavit, or in some cases a Notice of Application and Affidavit.

Section 30 of the *MPA* permits an *ex parte* application where there is a danger of injury to the spouse or a child as a result of the other's conduct. This clause is not referred to in the *FLA*, however the Court could make a direction with respect to service under the *Rules of Court*.

Practice tips

The ability to restrain a person from entering or attending near a home is under-utilized, a separate application for a restraining order is not always necessary, and such a direction can be used to address potential problems in advance.

The Court can also order any other necessary conditions.[145] The ability to direct an eviction often comes in the form of a time period for the excluded spouse to vacate the property. 30 days to vacate, or the first day of the following month, are both common lengths.[146] However, the length of time will depend on the circumstances, as a shorter period may be more appropriate where there is urgency or alternate accommodations such as multiple properties are readily available. It can also be directed that exclusive possession only be granted if support terms are also ordered, even if not specifically pled.[147]

Without excessive conflict, children, or limited means, the Court might simply tell the applicant that if they cannot tolerate the living arrangement, they need to find alternate accommodations.

The Respondent should consider seeking occupation rent, especially if there is significant equity in the home.

The definitions of "matrimonial home" and "family home" have several important implications. Exclusive possession need not be in relation to owned premises, a person can seek occupation of a leased premise. However this is where the 5th mandatory consideration may come into play, where

[145] *MPA* s 19(2); *FLA* s 68(3).

[146] For example, *Grunenwald v Grunenwald*, 2006 ABQB 186 at para 34; *Boutin v Viau*, 2007 ABQB 451 at para 18.

[147] *Mazepa v Embree*, 2014 ABCA 438 at para 9(d).

there are rental agreement or condominium by-law restrictions on who may occupy a premise, such as age requirements. Conversely, the permissibility of pets could be a factor limiting alternate available accommodations. As the definitions also refer to partial occupancy, even where there may be a business operating on the remainder of the parcel, it is possible to seek possession of a house located on farmland, or a residence located on top of a business. However, in cases of high conflict it may not be appropriate to have one spouse operating a business and the other spouse living immediately adjacent.

Further relief to divide household contents may be sought, in the form of an application for exclusive possession of household goods. Many judges will be reluctant to spend a significant quantity of time dealing with this. In that regard, practicality requires that counsel bring a list setting out a proposed distribution of household goods.

Even where possession is not through an order, debts relating to the home such as property taxes and home insurance should be borne solely by the party with possession of the home during the period of time that the debts accrued.[148] If the occupying spouse does not have the resources, this may need to be addressed through support. If they are not eligible for support and are unlikely to be able to meet expenses, this may be a factor against their possession.

An order for exclusive possession takes precedence over a subsequent order to **sell** the home.[149] This means that it cannot be undone solely by a later application for partition and sale, instead the exclusive possession order would need to be varied or dealt with at trial. As such, a respondent seeking to sell the property may want to consider a concurrent cross-application for partition sale. See "Sale and Partition of Land" at page 93 of this Manual.

Especially where the occupying spouse is not on Title or the property is a mobile home, they may want to consider **registering** against the Title to the land or in the Personal Property Registry, which would apply to a mobile home or household goods. A broad scope of registrations is permitted by sections 26 and 27 of the *MPA* and sections 74 and 75 of the *FLA*. Registration against land is permitted if owned by either, if leased for more than 3 years, or either has a life estate, and registration also binds an estate.[150]

[148] *M(N) v M(CL)*, 2008 ABCA 108 at para 8.

[149] *MPA* s 21; *FLA* s 70.

[150] *MPA* s 22; *FLA* s 71.

A person given exclusive possession of leased premises is deemed to become the tenant for the purpose of the lease.[151] This means that they become liable for the payment of rent and adherence to all terms of the lease. In that regard, the applicant might also want to consider a concurrent support application, and should be careful to ensure that they do not breach the lease.

Exclusive possession can also be granted pursuant to an Emergency Protection Order, which is beyond the scope of this paper. However, it may be desirable for the EPO to state that such exclusive possession is without prejudice to the application of either party under the *MPA*, *FLA*, or *Law of Property Act* for either exclusive possession of partition and sale.

In some cases, it is possible to obtain exclusive possession of property outside of Alberta.[152]

FIATS

Law

Rule 13.38 permits a judge or master to authorize, direct, or give permission to a court officer to do an act.

Practice tips

A fiat is typically written on the first page of a document, such as a Notice of Application or an Affidavit that does not otherwise comply with the Rules or Practice Note 2. For example:

> FIAT granted this ___ day of _____, 20__
> Let this affidavit be filed notwithstanding that it exceeds 40 pages of exhibits.
>
> _____
> J.C.Q.B.A. / M.C.Q.B.A.

The Justice or Master would then sign the signature space.

[151] *MPA* s 24; *FLA* s 72.

[152] See *Welsh v Welsh*, 2011 ABQB 686.

Pursuant to the May 19, 2016 Notice to the Profession and Public relating to the Section 21 Disclosure Initiative, a fiat to permit filing notwithstanding failure to comply with disclosure requirements must be in the following format:

> FIAT granted this ___ day of _____, 20__
> Let the Applicant's Application be filed without the Applicant s. 21 disclosure, without prejudice to arguments that the hearing should not proceed without that disclosure.
>
> The Applicant shall provide s. 21 disclosure within 30 days.
>
> _____
> J.C.Q.B.A.

Or:

> FIAT granted this ___ day of _____, 20__
> Let the Respondent's Affidavit/Reply be filed without the Applicant s. 21 disclosure, without prejudice to any arguments related to disclosure at the hearing.
>
> The Respondent shall provide s. 21 disclosure within _____ days.
>
> _____
> J.C.Q.B.A.

For documents which are not easily editable, fiats can either be written in by hand, stamped, or completed by typewriter or photocopying techniques for added professionalism.

Counsel may be directed to seek a fiat from a master, however counsel already in family chambers will likely be permitted to seek a fiat following their other matters.

Where there are other parties, fiats should be upon notice to them. Depending on the circumstances, this could be as simple as sending opposing counsel an email advising when you will be attending court to obtain the fiat, or asking whether they want to know the date so that they can appear.

Fiats may also be directed against the Land Titles Office, however beware that section 191 of the *Land Titles Act* (Alberta) essentially requires confirmation that appeal rights have expired. As this is often very impractical, the fiat can also state "and notwithstanding compliance with section 191 of the *Land Titles Act* (Alberta)."

FORM OF ORDER AND RULE 9.4(2)

Law

Unless the Court orders otherwise, the successfully party will draft the judgment or order, pursuant to Rule 9.2. The responsible party is then required to prepare a draft and serve it on all parties within 10 days. Within 10 days, the other parties must either approve the draft, or object to the draft, "providing particulars of the objection". If the approval or objection is not received within 10 days, the judgment or order may be sent to the Court for signing and filing notwithstanding a lack of consent or objection, but must be accompanied with proof of service.

Where there is a dispute as to the form, the matter may be returned to the Court for resolution.

Rule 9.1 requires that judgments and orders be divided into numbered paragraphs, and must include the date and location upon which it was pronounced, as well as the name of the master or judge.

Unless ordered otherwise, pursuant to Rule 9.6, orders come into effect on the date they are pronounced, even if the form of order has not yet been drafted.

In the absence of exceptional circumstances, there is an obligation upon lawyers to sign orders which reflect what was read into court, even resolutions were read into court by consent. The failure to sign such an order is an egregious failure to properly conduct legal proceedings.[153]

[153] *Martin v Busenius,* 1999 ABQB 100 at paras 4, 27; *Neddow v Weidemann*, 2008 ABQB 378; http://www.lawsociety.ab.ca/lawyers/practice-resources/practice_advice_signing_court_orders.aspx

A judgment or order shall not be entered more than 3 months after it is pronounced, unless the permission of the Court is first obtained upon notice to all parties, pursuant to Rule 9.5(2).

Rule 9.8 requires that the filed judgment or order must be served on all other parties, unless the Rules or the Court provide otherwise.

Rule **9.4(2)** permits the Clerk to sign the form of Order where the party adverse in interest did not attend (9.4(2)(a)), the party adverse in interest approves or waives approval of the form of order (9.4(2)(b)), where the Court directs that approval by a party is not required (9.4(2)(c)), or the Court directs the clerk to sign (9.4(2)(d)).

Rule 9.12 permits the proclaiming judge to correct a mistake or error in a judgment or order arising from an accident, slip, or omission. Rule 9.13 permits the presiding judge to vary a judgment or order any time before it is filed, or to hear more evidence and then vary it. Rule 9.14 permits an application for a further or other order where variance is not required and such relief is "needed to provide a remedy to which a party is entitled in connection with the judgment or order."

Rule 9.15 permits the proclaiming judge, upon application made within 20 days of the earlier of service or the order coming to the applicant's attention, to set aside, vary, or discharge an order made without notice, an order made after a party did not appear because of an accident, mistake, or insufficient notice, where information arose or was discovered after the order was made, with the agreement of every party, or "on other grounds that the Court considers just." See also "Noting in Default" at page 77 of this Manual.

Practice tips

As Rule 9.2 is rarely invoked, it appears customary for parties to warn about an impending or expired 10 day deadline before sending the form of order to the Court without consent, possibly to avoid an allegation of taking advantage of the opposing counsel's error or omission, an application to correct an error, or to avoid personally offending opposing counsel.

Where there is a dispute as to the form of order, it may be advisable to first obtain a transcript of the proceedings to confirm what was ordered. A review or exchange of such transcript may resolve the issue. Alternatively, it could be more cost-effective to offer to pay half of the cost of the transcript, so that if the opposing counsel orders and reviews the transcript before you do, it could save you the

time of reviewing the transcript. However, if there is a risk that your client may be found in contempt if your interpretation is incorrect, you should order the transcript immediately.

Appeal deadlines run from the date of pronouncement, not the date of filing of the form of Order. To appeal an Order there must also be a form of that Order prepared.

Rule 9.4(2) is typically invoked without needing to be pled in the Notice of Application. In addition to the enumerated grounds, it is common for the Court to direct that approval is not required pursuant to Rule 9.4(2)(c) where the opposing party is a self-represented litigant. Rule 9.4(2)(d) is often invoked where it is desirable that the form of Order be signed quickly by a Clerk without having to wait for judicial scrutiny, or where such scrutiny of a simple order would not be an efficient use of judicial resources, for example in relation to service *ex juris*. However, as the Court will often not invoke Rules 9.4(2)(c) and 9.4(2)(d) of its own volition, it is important that counsel remember to request this direction from the presiding judge. Where such direction is granted, a paragraph within the form of order should specify, for example, "Rule 9.4(2)(c) is hereby invoked.".

A Court Notes Memorandum precedent is attached as Appendix "J", which provides reminders as to the difference between rules 9.4(2)(c) and (d).

Rules 9.12 or 9.14 may be preferable to a fresh application to vary an order or an appeal, especially if it is simply clarification or correction that is required.

Especially in *ex parte* matters, it can be useful to draft a form of order in advance. Alternatively, Law Libraries can be used to print a form of order, and then depending on the time it may be possible to return to the same Justice to have it signed. Many Law Libraries will likely also have green paper available.

In Edmonton and possibly other judicial centres, an *ex parte* sheet must be filled out whenever appearing on an *ex parte* matter.

In Red Deer, consent orders cannot be simply sent to the Court with an *ex parte* sheet.

FORMAL OFFERS TO SETTLE

Law

Rule 4.24 permits a party to serve a formal offer any time after the Statement of Claim is filed, however it must be served at least 10 days before trial, summary trial, or the application hearing date, as the case may be.

Rule 4.24(2) requires that the formal offer be in Form 22 and that the form be completed in whole.

Rule 4.28 requires that the formal offer be kept confidential and not disclosed to the court unless accepted or after the decision is rendered, when addressing costs.

Pursuant to Rule 4.24(3), formal offers must remain open for acceptance until at least the first of either: two months after service, or the start of the trial, summary trial, or hearing, as the case may be. Due to Rule 4.24(4), a formal offer may not be withdrawn before the deadline specified unless the Court first gives permission (and there are special circumstances that justify withdrawal), and the party who made the offer serves written notice of the withdrawal on every party who received the offer.

A formal offer is accepted by filing the formal offer and acceptance, and serving notice on the party who made the offer that it has been accepted and the terms of any judgment or order have been agreed to (Rule 4.25). After that time, a party may apply to the Court for a judgment or order according to the terms of the formal offer, and continue the action in relation to any matters not covered by the judgment or against any party who is not a party to the settlement (Rule 4.25(3)).

Cost consequences are set out in Rule 4.29. If a plaintiff obtains a result that is equal to or more favourable than their formal offer, they are entitled to double the costs they would have otherwise received, for all steps taken in relation to the action or claim after service of the offer, excluding disbursements. A defendant is only entitled to double costs if the result is equal or more favourable than their formal offer, and the action or claim is dismissed. In that regard, the formal offer process is not as useful to defendants.

Double costs will not apply to solicitor-client costs, a lump sum in addition to assessed costs, offers made less than 10 days before an application for judgment after a summary trial, offers made less

than 10 days before the scheduled start of a trial, a properly withdrawn formal offer (see above), or if in "special circumstances" the Court orders that double costs need not apply.

Due to Rule 3.10, the formal offer rules don't apply to proceedings commenced by originating application, unless the parties agree or the Court orders otherwise.

Where the formal offer is simply offering to permit a dismissal on a without costs basis, the offeror is not necessarily entitled to double costs.[154] That may also be the case where the formal offer is for the full value of the claim, as these types of offers lack an element of compromise. However, whether or not the offer contains an element of compromise is not determinative, the Court must look at the amount or nature of the settlement in relation to the relief claimed or the judgment, the relationship of the proposed settlement to an objective view of the relative merit of the position of the parties, and the timing of the offer, in relation to the commencement of the trial or hearing.[155]

Practice tips

The party making the formal offer does not file it. It is only filed if accepted by the other party.

Because of Rule 4.25(3), a party seeking to enforce a settlement through a formal offer does not need to sue, they only need to apply to the court for their order or judgment. In that regard, the ability to seek a judgment/order reflecting the terms after acceptance can be beneficial, as it avoids having to "sue on the settlement" in the traditional fashion.

The cost consequences can be especially valuable following a trial, or at the appellate level. In that regard, it may be worth filing formal offers before most trials or appeals, especially if acting for the plaintiff. Matters at higher columns (such as property division) might also make a formal cost more lucrative or intimidating. See "Costs" at page 30 of this Manual.

Because the formal offer process can apply to interim applications, a formal offer may be made in advance of a Special Chambers hearing, or even a morning of afternoon Chambers hearing.

Due to Rule 4.26, if a formal offer does not address costs, costs will still need to be addressed.

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[154] *Fletcher v Davidson & Williams LLP*, 2015 ABQB 783 at para 27.

[155] *Allen (Next Friend of) v University Hospitals Board*, 2006 ABCA 101 at para 17.

A formal offer could be limited to disposing of only part of the dispute, or pertain to only some of the other parties.

Not all costs are doubled, only the steps taken after service of the formal offer, and disbursements are not doubled.

Even if the formal offer is simply for dismissal or the full value of the claim without costs, double costs would probably still be granted if the opposing party had a frivolous claim or defence with little likelihood of success. Essentially, in circumstances where a party would not be expected to compromise.

See "Costs" at page 30 of this Manual.

GOWNING

Law

Page 30 of the June 1, 2010 Consolidated Notices to the Profession states that gowning protocol may vary by Judicial Centre, in which case the Trial Co-ordinator may be contacted. However generally in the Court of Queen's Bench gowns are required in family law matters in the following circumstances:

a. Any time viva voce evidence is to be heard, such as in trials, Special Chambers with *viva voce* evidence, and *viva voce* EPO hearings;
b. All civil trials, including uncontested divorces, summary trials, and assessments;
c. In provisional and confirmation matters pursuant to the *Reciprocal Enforcement of Maintenance Orders Act*;
d. Oral hearings for divorce;
e. In Edmonton, the judge has the discretion to order gowning for divorces;
f. All appeals, except appeals from Masters and interim applications made to the Court of Appeal;
g. For judgement where gowning was required for the hearing;
h. For ceremonial hearings, such as adoptions (except in Calgary where gowning is at the discretion of the judge), Principals and their student sought to be admitted at bar admission ceremonies, and swearing-in ceremonies.

Likewise, gowns are not required:

a. In pre-trial conferences or mini trials;
b. For divorces in Calgary;
c. Chambers, unless there will be *viva voce* evidence, as in the case of Special Chambers where leave for *viva voce* evidence has been obtained;
d. Maintenance Enforcement show cause hearings; and
e. During Judicial Dispute Resolution.

Practice tips

Gowning is generally required in the Court of Queen's Bench where there will be live witnesses.

IMPUTING INCOME

Law

Income may be imputed in such an amount as the court considers appropriate in the circumstances, in circumstances which include:

a. the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
b. the spouse is exempt from paying federal or provincial income tax;
c. the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
d. it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
e. the spouse's property is not reasonably utilized to generate income;
f. the spouse has failed to provide income information when under a legal obligation to do so;
g. the spouse unreasonably deducts expenses from income;
h. the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

i. the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Where persons hold business interest and their income does not fairly reflect all the money available for the payment of child support, the court may also take a "*quantum meruit*" approach to impute an amount commensurate with the services that the spouse provides to the corporation, in an amount up to the corporation's pre-tax income, and may consider the situations described in section 17.[156] See "Business Expense Disclosure" at page 19 of this Manual for additional information relating to business interests.

Some decisions have stated that income should only be imputed where the court has evidence of the intention to avoid or undermine child support obligations.[157] In relation to under-employment or unemployment, this requires either proof of a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the intention is to undermine or avoid support obligations.[158] In relation to property not reasonably utilized to generate income, the test has been said to be how a "reasonably prudent" businessperson would use the property to generate income, keeping in mind the need for funds for legitimate business objectives.[159]

Practice tips

One very useful resource is the Alberta OCCinfo database. This is a collection of statistical data regarding average wages for a copious quantity of occupations in Alberta. As a government resource, courts should be able to take judicial notice. It is critical to include this information in all child support applications where you are not yet in possession of the opposing party's financial information. This resource can be found at http://occinfo.alis.alberta.ca/occinfopreview/info/browse-occupations.html

Reference to similar decisions is recommended.

[156] *Federal Child Support Guidelines*, s 18(1)(b).

[157] *Hunt v Smolis-Hunt*, 2001 ABCA 229 at para 24.

[158] *Hunt v Smolis-Hunt*, 2001 ABCA 229 at para 42.

[159] *Mollot v Mollot*, 2006 ABQB 249 at para 63.

INDEPENDENT COUNSEL FOR THE CHILDREN

Law

Appointing

In *Family Law Act* matters, independent counsel are authorized pursuant to section 95(3).

Independent counsel should be appointed in cases where there are:[160]

a) Allegations of child abuse,
b) An apparently intractable conflict between the parents;
c) The child is apparently alienated from one or both parents;
d) Real issues of cultural or religious difference affecting the child;
e) Sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge on the child's welfare;
f) Conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
g) Issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child;
h) On the material filed by the parents, neither seems a suitable custodian;
i) A child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
j) One of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently relocated to such a place within the jurisdiction as to greatly restrict or for all practical purposes exclude the other party from the possibility of access to the child;
k) It is proposed to separate siblings;
l) None of the parties is legally represented (both are self-represented litigants); and
m) Applications to the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

Even if a matter falls within one of the above listed circumstances, courts retain the discretion to appoint or not appoint independent counsel.[161]

In a recent decision out of British Columbia, gender dysphoria (transgender) appears to have resulted in the appointment of independent counsel.[162]

[160] *Puszczak v Puszczak*, 2005 ABCA 426 at paras 14-16; *Smith v Lagace*, 2011 ABQB 405 at para 24.

[161] *Puszczak v Puszczak*, 2005 ABCA 426 at para 15.

It is a reviewable error to appoint independent counsel solely because that independent counsel is well known, without reference to whether the appointment is necessary or desirable in the circumstances.[163]

Independent counsel can be appointed through either of three roles, which can be set out in the Order:

1. **Direct Advocacy Role:** to advocate for the child(ren)'s expressed views and interests;
2. **Best Interests Role: t**o ascertain the child(ren)'s views and protect the child(ren)'s interests, without being bound by the child(ren)'s directives or objectives; or
3. ***Amicus Curiae* Role:** to protect the child(ren)'s best interests, without being bound by the child(ren)'s directives or objectives.

Legal Aid's Family Law Office circulates its own form of Order appointing independent counsel, and can be contacted to request the most recent editable copy.

Instructing

Unless the independent counsel is acting in a best interests capacity or on behalf of the court, the child represented must have the capacity to instruct counsel, meaning that they are capable of making reasonable choices and exercising judgment without undue adult influence.[164] If the child has capacity to instruct counsel, then the independent counsel should not state the child's views and preferences, nor express an opinion on any issue, without the express consent of the other counsel.[165]

The weight given to the child's views or decisions should take into account:[166]

a) Whether the child had made good decisions of a substantial nature for himself or herself in other situations;
b) Whether the child had the ability and opportunity to, and in fact had reasonably weighed the more important competing benefits and disadvantages in reaching their decision;
c) Whether the child's decision was reached with a reasonable measure of independence; and

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[162] *K(N) v H(A)*, 2016 CarswellBC 1141 (BCSC).

[163] *Puszczak v Puszczak*, 2005 ABCA 426 at para 17.

[164] *Puszczak v Puszczak*, 2005 ABCA 426 at para 20.

[165] *RM v JS*, 2013 ABCA 441 at paras 28-29.

[166] *RM v JS*, 2013 ABCA 441 at para 25.

d) Whether the child's fears appear reasonable, in the circumstances.

If permitted by the enabling order, independent counsel can make submissions relating to information provided by third parties without such evidence being inadmissible in chambers.[167] In any event, in relation to interim orders, information may be provided based on information and belief, pursuant to Rule 13.18.

Practice tips

Independent counsel can be particularly useful in situations of high parental conflict or where parenting time or conditions are likely to change. Otherwise, if only the views of a child are sought in relation to a particular issue, a single Voice of the Child Report prepared by a psychologist might be preferable. See Voice of the Child Reports under "Practice Note 7" at page 81 of this Manual.

Many independent counsel will follow many of the same procedural safeguards followed by psychologists when conducting Voice of the Child Reports, such as multiple interviews with the children, having each parent bring in the children on at least one occasion, obtaining corroborating evidence of parental impropriety prior to repeating serious allegations, and declining to make recommendations to the Court, especially where they have insufficient information. However, the practices employed by independent counsel and their objectivity can vary significantly. In that regard, it may be preferable to jointly agree to which independent counsel to appoint, or to suggest a particular independent counsel to the court.

Independent counsel are usually appointed through Legal Aid, as Legal Aid will not decline coverage for a child, even if their parents' have the means to pay for a private lawyer. However, in some cases parties choose to hire independent counsel on a private retainer outside of the Legal Aid framework. This may be because of familiarity with a particular independent counsel, or to expedite the process. In family law matters, independent counsel should never be retained unilaterally through only one parent without approval of the other parent or court order, especially where there is joint custody.[168]

The *Family Law Act* specifically authorized independent counsel as the Provincial Court is a creature of statute requiring specific authority before it can make decisions. Nothing would prevent the Court

[167] *TNR v. WPR*, 2016 ABCA 322 at para 7.

[168] *Puszczak v Puszczak*, 2005 ABCA 426 at paras 19-25, 28.

of Queen's Bench from ordering independent counsel in appropriate circumstances, for example through a Rule 1.4 procedural order.

INTERVENORS

Law

On application under Rule 2.10, a third party may intervene in an action, subject to the terms specified by the Court.

Although the previous inherent jurisdiction pursuant to the common law was codified into Rule 2.10, the previous principles continue to apply.[169] Namely, the court must determine the subject matter of the proceeding, and then determine the intervenor's interest in the subject matter, considering whether they will be specifically affected, whether they have specific expertise or insight to assist the Court, and whether they have an interest which may not be fully protected or fully argued by the parties. At the appellate level the intervenor may not raise new issues if it would prejudice any of the other parties.

Practice tips

This is common in issues where the *Charter* is raised, there is an affected third party (ie grandparents, a trustee, or beneficiary), or the matter is otherwise important to a large portion of the population.

In issues of parenting, a third party seeking parenting time may see more success by applying for contact or guardianship. Third parties may also seek to instead join multiple actions/applications. If a third party is concerned that a party may not adequately defend an action, they may also want to consider offering to contribute to that party's legal fees, although counsel must of course continue to follow the party's instructions.

See also "Third Party Transferees" and "Third Party Documentation" at page 120 of this Manual.

[169] *University of Alberta v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 389.

JOINING/CONSOLIDATING OR SEPARATION OF CLAIMS AND PARTIES

Law

Multiple claims may be **joined** pursuant to Rule 3.69. Not all remedies need apply to each defendant. Consolidation may also be granted pursuant to Section 8 of the *Judicature Act* (Alberta), upon the terms and conditions that seem just to the Court, pursuant to the Court's general jurisdiction.

Matters involving multiple defendants may be **separated** pursuant to Rule 3.71 where leaving the matters joint would unduly complicate or delay the action, or cause undue prejudice to a party. The Court may also order separate trials/hearings/applications, separate one or more claims, order compensation for attendance at part of a trial/hearing/application where they had no interest, or excuse a party from attending all or part of a trial/hearing/application in which they have no interest.

Under either of these remedies, Rule 3.72(a) provides that the Court may **also order** that claims be tried at the same time, tried one after the other, that one or more claims be stayed until one can be heard, or that a claim be asserted as a counterclaim in another action.

Rule 3.72(2) permits the Court to consider, *inter alia*, whether there is a common question of law or fact, or whether matters arise out of the same transaction or occurrence or series of transactions or occurrences.

The considerations adopted by our Court of Appeal are set out in *Mikisew Cree First Nation v Canada*, [1998] AJ No 869 (Alta QB) at para 2:[170]

a) Whether there are common claims, disputes and relationships between the parties;
b) Whether consolidation will save time and resources in pre-trial procedures;
c) Whether time at trial will be reduced;
d) Whether one party will be seriously prejudiced by having two trials together;
e) Whether one action is at a more advanced stage than the other; and
f) Whether consolidation will delay the trial of one action which will cause serious prejudice to one party.

[170] *Munro v Munro*, 2011 ABCA 279 at para 28; *Alliance Pipeline Ltd Partnership v CE Franklin Ltd*, 2007 ABCA 285 at para 1; *B & S Publications Inc v Gaulin*, 2002 ABCA 238 at para 5;

Practice tips

This rule may be relevant where there are step-parents, grandparents, corporations or other business interests involved with the parties, corporate actions such as oppression or derivative actions, or civil claims between the parties, such as defamation.

Be wary of filing concurrent civil claims in the midst of parenting disputes, unless they have obvious merit or you are facing a limitation period, lest your client be found to be negatively affecting the other party's ability to parent.[171]

Where matters are tried together or heard one after the other, they typically otherwise remain separate, such as maintaining separate document production and separate action numbers, although it can be directed that the evidence heard in one matter be considered in the other.

This is not the same as severance of corollary relief from the divorce. See "Severance" at page 103 of this Manual.

See also "Intervenors" at page 64 of this Manual.

JUDICIAL DISPUTE RESOLUTION

Law

Judicial dispute resolution is set out in Rules 4.17 to 4.21.

Binding JDRs are typically considered contractual.[172] Agreements to defer to a judge's decision should comply with the *Matrimonial Property Act*'s requirements pertaining to agreements, as "[a]n opinion in a binding JDR is not a judgment of the court; it binds parties as a result of the contract entered into when commencing a JDR".[173]

[171] *Edwards v Basaraba*, 2015 ABQB 594 at para 102(3).

[172] *J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd. and Trillium Homes Ltd.*, 2005 ABCA 103; *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.*, 2006 ABQB 567.

[173] *A.S. v. N.L.H.*, 2006 ABQB 708 at para 15(a).

Where a party refuses to endorse an Order setting out the terms directed by a judge, and that judge will not hear an application (as Rule 4.21 prohibits them from deciding any subsequent application, proceeding, or trial), the only remedy may be to enforce the settlement as an agreement. However, a judge can still be involved in non-contentious issues such as signing an order reflecting a settlement agreement.[174] See "Summary Judgment" at page 111 of this Manual, and *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.*, 2006 ABQB 567.

As the arrangement is contractual, some courts have also stated "A JDR is not subject to appeal or judicial review".[175] In at least two decisions an appeal and a determination as to the terms of the Order were permitted, as an agreement was not signed, and so the result was along the lines of an agreement reached at a non-binding JDR.[176] In the *obiter dicta* of *Megyesi v. Megyesi*, 2005 ABQB 706 at paras 13-14, it was contemplated that the only appeal may lie in the terms of the Binding JDR Agreement, not the decision reached.

A judge conducting a binding JDR has the authority to award costs on a similar basis to Special Chambers calculations.[177]

Practice tips

Non-binding JDRs are essentially mediations with judges, whereas Binding JDRs in effect result in arbitration where no agreement can be made. In a Binding JDR, the parties sign an agreement with certificates of independent legal advice providing that they will follow the recommendation of their judge. Binding JDR agreements often provide that there will be no right of appeal. Not all judges perform Binding JDRs.

Available judges in the Court of Queen's Bench can be viewed from the Judicial Assignments page: https://albertacourts.ca/court-of-queens-bench/assignments

In the Court of Queen's Bench, Briefs are required, and there is usually a pre-JDR conference to discuss items such as documentation and page limits. Briefs typically set out a statements of facts,

[174] *L.N. v. S.M.*, 2007 ABCA 258 at para 35.

[175] *A.S. v. N.L.H.*, 2006 ABQB 708 at para 15(d).

[176] *Dueckman v Dueckman*, 2013 ABCA 306 at para 7; *Feland v. Truss*, 2009 ABQB 700 at para 19.

[177] *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.*, 2006 ABQB 567 at para 113.

positions, and materials relied upon, which will be bound, tabbed, and ideally highlighted. JDRs are also available in the Provincial Court and the Court of Appeal. In Provincial Court matters in the greater Edmonton region, JDRs typically occur in Edmonton or St. Albert. In Edmonton, a Court Clerk is typically present to cement any agreements reached on the record. In addition to the advantage of being able to instantly make a settlement binding, Provincial Court JDRs also do not require lengthy briefs, which can make them much more cost effective. On the other hand, Provincial Court JDRs are often shorter than their counterparts in the higher courts. There is no fee to schedule a JDR.

The Provincial Court in Calgary has published JDR Guidelines: https://albertacourts.ca/docs/default-source/provincial-court/jdr-sheet.pdf?sfvrsn=2

The Court of Appeal has also published JDR Guidelines: https://albertacourts.ca/docs/default-source/default-document-library/guidelines-for-judicial-dispute-resolution-(jdr).pdf?sfvrsn=0

LESA has published A Handbook on Judicial Dispute Resolution for Canadian Lawyers, written by the Honourable Mr. Justice J.A. Agrios, which can be viewed at https://www.lesaonline.org/samples/03_15_01.pdf

LITIGATION PLANS

Law

In standard cases, either party may serve a proposed litigation plan or a proposal for the completion or timing of any stage of step in the action. Pursuant to Rule 4.4(2), if no agreement is reached, either party may apply to the Court for a procedural or other order respecting the plan or proposal.

Complex cases are defined by Rule 4.3(2). If there is no agreement or order pursuant to Rule 4.8 declaring the matter to be a complex case within 4 months from filing of a Statement of Defence, the matter is automatically deemed to be a standard case. The parties' obligations in relation to a complex case are set out at Rules 4.5 and 4.7, or applications may be made pursuant to Rules 4.6 or 4.7.

Practice tips

Litigation plans usually set deadlines for each step in the litigation, such as close of pleadings, production of financial documentation, Questioning, interim applications, exchange of expert reports, participation in alternative dispute resolution, and setting the matter for trial.

It may be desirable to list the litigation plan in a Consent Order to increase the likelihood of adherence.

Family law matters will rarely be considered complex cases.

LITIGATION REPRESENTATIVE

Law

Pursuant to Rule 2.11, a litigation representative must bring or defend an action on a person's behalf, where that person is either a) under the age of 18; b) declared to be missing under section 7 of the *Public Trustee Act*; c) lacks capacity to make decisions in relation to the claim or action, as defined by the *Adult Guardianship and Trusteeship Act*; or d) an estate wherefore there has not yet been a Grand of Probate or Grand of Administration issued by the Court.

A litigation representative may be appointed automatically where there is legislative authority, or a valid order or instrument, as set out in Rule 2.13. This typically means a Power of Attorney following a triggering event (typically a doctor's written opinion or a capacity assessment), a Grant of Probate, a Grand of Administration, or in some cases a trust agreement.

A person can become a self-appointed litigation representative by applying to the Court with an Affidavit, following the requirements set out at Rule 2.14.

The Court may appoint a litigation representative pursuant to Rules 2.15 or 2.16, where no person has applied to be self-appointed.

Rules 2.18 and 2.19 require judicial approval of settlements in certain circumstances, primarily where there is not express authority to settle legal matters, and Rule 2.20 requires that settlement proceeds be paid into the Court in some circumstances.

Rule 10.47 states that a plaintiff's litigation representative is liable to personally pay any costs awarded against the estate. This rule does not apply to a defendant's litigation representative unless they have engaged in serious misconduct or the Court orders otherwise. There is a strong case for exempting costs where a litigation representative is necessary (likely in terms of both a lack of capacity, the inability or unwillingness of any other person to act, and there being a *prima facie* case set out in the Statement of Claim), and the person appointed is essentially a stranger in the nature of a professional advisor, rather than a parent or guardian.[178]

There may be a conflict of interest where a person acts as a litigation representative for more than one party (ie parents and child).[179]

Practice tips

A litigation representative is not the same as a person's lawyer, although a litigation representative could be a lawyer. A litigation representative stands in the place of a client. Subject to some constraints, they make decisions in relation to the legal matter, and can retain counsel. Their authority is constrained by the instrument or order authorizing their appointment, and any governing legislation, such as the *Powers of Attorney Act* (Alberta) or *Trustee Act* (Alberta).

If the opposing party has a litigation representative, it may be wise to confirm that they have been properly appointed, so that any agreements and orders are not tainted.

A Capacity Assessment Report is a form used in adult guardianship and trusteeship matters, which can be found on the Alberta Human Services website, Form 4, presently located at http://www.humanservices.alberta.ca/guardianship-trusteeship/agta-instructions-capacity-assessment-report-form4.html . It is typically completed by a physician or registered psychologist, but in some cases others may be designated capacity assessors. A physician must also complete a medical evaluation. Alberta Human Services also publishes a Guide for Capacity Assessors which can be found at http://www.humanservices.alberta.ca/documents/opg-guardianship-publication-opg5630.pdf

[178] *LC v Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 at paras 53-59.

[179] *LC v Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42.

Typical cases where the Court might appoint a litigation representative include where a party is seeking a litigation representative for an opposing party who lacks capacity, on application of a trustee where funds are held in trust, or where counsel suspects that their client lacks capacity but requires instructions as to how to proceed. Rule 2.17 permits the Court to allocate the cost thereof, which may be in some circumstances ordered to be paid by the Public Trustee.[180] This may also result in a determination of whether or not advance costs are appropriate.[181] See "Advance Costs" at page 5 of this Manual. As the Court has the ability to set the terms of representation, it may be wise to exempt the litigation representative from liability.

For the purpose of addressing validity of any settlement and liability of the litigation representative, it may be desirable to prepare a Consent Order to approve any settlement, which also authorizes the distribution of any settlement funds. Either the Court or proper diligence may also require a sworn Affidavit to accompany such a Consent Order.

Although the litigation representative may be personally liable, the document appointing them could provide for reimbursement.

Lawyers who act on the instructions of a litigation representative must ensure that the litigation representative is properly appointed.

MANDATORY EARLY INTERVENTION CASE CONFERENCE

See the Notice to Profession and Public relating to Mandatory Early Intervention Case Conference Pilot Project for Family Law Matters dated October 31, 2016, which can be found at https://albertacourts.ca/docs/default-source/Court-of-Queen%27s-Bench/ntp-2016-08-mandatory-early-intervention-case-conferen_1.pdf

[180] *LC v Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 at paras 60-61.

[181] *LC v Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 at para 62.

MASTERS

Law

Masters' jurisdiction is derived from section 9 of the *Court of Queen's Bench Act* (Alberta), and delineated in a Notice to the Profession and Public dated December 8, 2016, which can be found at https://albertacourts.ca/docs/default-source/Court-of-Queen%27s-Bench/ntp-2016-10-master-39-s-jurisdiction.pdf

Masters can be appealed to a justice in chambers pursuant to Rule 6.14 and section 12 of the *Court of Queen's Bench Act*.

Practice tips

In family law matters in Edmonton, the Clerks have stated that they are only permitting applications to Masters for substitutional service, service *ex juris*, and fiats. However, the above Notice to the Profession is still relevant to *Maintenance Enforcement Act* matters.

Masters' Chambers often concludes sooner than Family Law Chambers, and will often have multiple courtrooms to choose from.

MEP STAY OF ENFORCEMENT

Law

Section 32 of the *Maintenance Enforcement Act* (Alberta) permits an application for a stay of enforcement in relation to the Maintenance Enforcement Program's collection of child and spousal support.

Applications must be made to the Court of Queen's Bench (s 32(1)).

Applications must be served on the Director of MEP and the creditor (support recipient) (s 32(1)).

The debtor must establish that they made attempts to establish a payment arrangement with MEP but there was a valid reason why they were unable to enter into an arrangement. The debtor must

also establish that they have a valid reason for not paying arrears or periodic maintenance payments during the period the stay is in effec.

Stays will apply to arrears, but the Court can also award that they apply to ongoing payments or lump sum payments (ss 32(3)(a) & (b)).

Unless the Court orders otherwise, stays shall terminate after 9 months (s 32(3)(c)).

Stays will not apply to proceedings carried out under federal enactments, Land Titles or PPR registrations, and motor vehicle restrictions (s 32(4)).

The Court may direct that any money or portion of money paid into the Court or to MEP may be released to the debtor (s 32(6)).

Section 32 is the only legislation capable of granting a stay against MEP, the Court no longer retains inherent jurisdiction.[182]

Practice tips

On November 22, 2016, the *Maintenance Enforcement Act* was amended. As of the date of writing, the amendments were not yet published to CanLII, but can be found on the Queen's Printer website at http://www.qp.alberta.ca/1266.cfm?page=M01.cfm&leg_type=Acts&isbncln=0779745167

The significant new change is the evidentiary requirements, particularly with respect to an attempt to negotiate an arrangement. The Court is no longer limited to a maximum of a 9 month stay.

Courts will often grant less than the 9 month period. For example, a stay of one month may be directed until documentation is provided, and the matter adjourned so that the stay can be reconsidered at that time.

[182] *Minhas v Minhas*, 2014 ABQB 299 at para 3.

NOTICE TO ADMIT

Law

Rule 6.37 permits service of a Notice to Admit in Form 33. The item admitted can either be a fact, or a written opinion, which can be attached to the Notice. The written opinion must state the facts in which it is based. Although the Notice need not be directed to all parties, it must still be served on all parties.

All items are presumed to be admitted unless a party serves a statement within 20 days of service which either:

a. Denies an item, "and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires"; or
b. Sets out an objection on the ground that some or all of the answer would be privileged, irrelevant, improper, or unnecessary.

Rule 6.37(5) clarifies that "[a] denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

Pursuant to Rule 6.37(6), an admission may be amendment or withdrawn upon consent of the parties or with the Court's permission. Several factors can be considered when determining whether to permit the withdrawal of an admission:[183]

a) Was the admission intentionally made, was it inadvertently made, or inadvertently permitted to arise by operation of the Rules?
b) What is the explanation for permitting the admission to arise, or for having made an admission which is now said to be inaccurate?
c) If there has been any delay in moving to withdraw the admission, what is the explanation for that delay?

[183] *Stringer v Empire Life Insurance Co*., 2015 ABCA 349 at paras 12 to 30.

d) Has the applicant provided sufficient evidence to demonstrate that the admitted fact may not be true, and that there is a genuine issue about an important enough fact to warrant sending the disputed fact to trial? and
e) Would the withdrawal of the admission cause prejudice to the other party that cannot be remedied by costs or other terms: R. 1.5(4)?

In that regard, when withdrawal is permitted, it will generally be allowed with costs.

Rule 6.37(8) permits the Court to set aside a Notice to Admit upon application. However, it may be more practical to merely set out the objection.

Rule 6.37(7) states that an admission can only be used for the specific purpose for which it is requested, as set out in the notice.

A denial or refusal to admit anything that should have been admitted can be considered when assessing costs, due to rule 10.33(2)(b).

Practice tips

Common purposes include interim applications, trials, summary judgment, and summary trials.

Failure to properly deny a fact could inadvertently lead to an admission, although in other cases a vague denial may be difficult to enforce as an admission against the denier. A further application to force proper answers could be brought by the party issuing the notice, for example pursuant to Rule 1.4.

The Notice to Admit procedure could be used to by-pass the inability to issue a Reply Affidavit, by-pass Affidavit page limits, or to essentially conduct a limited Questioning. However, be cautious that a party could also use their response to furnish additional evidence.

A Notice to Admit need only be served, not filed.

See the example Notice to Admit at Appendix "C" to this Manual.

NOTICE TO DISCLOSE

Law

Rule 12.41 permits the filing of a Notice to Disclose / Application in Form FL-17.

After a final determination of support has been made, the procedure may only be used once per year (Rule 12.41(4)) and only items 1 to 9 may be requested, unless the Court directs otherwise (Rule 12.41(5)).

At least one month's notice must be provided (Rule 12.41(6)), and any documents required by section 21 of the *Child Support Guidelines* must also be served upon the respondent. When counting one month, the time is calculated from the date of service, to the same numbered day in the next month, pursuant to Rule 13.4.

If the respondent fails to provide the documents requested within one month of being served, the Court may order the documents be provided by a specified date, draw an adverse inference and impute income, or order solicitor-client costs, and grant any other appropriate remedy.

If an applicant does not provide their income tax returns, their support application can be dismissed.[184]

In *Khurana v. Khurana*, 2017 ABCA 42 there had been repeated applications to vary support even though the Applicant failed to first provide their financial information. As a result, the presiding Justice seized themselves of the matter, and required leave before any further application to vary was brought.

Practice tips

Sections 21 of the *Alberta* and *Federal Child Support Guidelines* set out additional disclosure requirements.

[184] *Khurana v. Khurana*, 2017 ABCA 42.

It can be beneficial to obtain information about average salaries in the Respondent's industry, such as from Alberta' OCCinfo service, which can be located at http://occinfo.alis.alberta.ca/occinfopreview/info/browse-occupations.html

At least in Edmonton, judges have been directed to take a hard line on the one-month deadline, to not grant adjournment requests absent sufficient reasons. Even in that case they are to consider imputing income and granting an interim order, as well as granting costs.

See "Imputing Income" at page 59 of this Manual.

See "Business Expense Disclosure" at page 19 of this Manual.

NOTING IN DEFAULT AND SETTING ASIDE

Law

A party can be noted in default if no extension has been granted and the time periods to file pleadings set out in Rule 3.31 have expired. This is generally 20 days to file a Statement of Defence within Alberta, one month in another Canadian province, and 2 months if service is effected outside of Canada.

Once a party has been noted in default, in a divorce action where no division of property is sought, a party may apply for a Desk Divorce. However, the terms of the Divorce Judgment may only contain what was pled in the Statement of Claim for Divorce, in which case it is desirable that parenting terms sought be adequately specified in the Statement of Claim for Divorce. Otherwise, the next step depends on whether the claim is a "liquidated demand" or not. Rule 3.39(2) defines "liquidated demand" to be a specific sum payable under an express or implied contract for the payment of money, including interest, not being in the nature of a penalty or unliquidated damages, where the amount claimed can be determined by the terms of a contract, calculation only, or taking an account between the parties. Alternatively, a claim for a specific sum as specified by an enactment specifying that the sum may be recovered as a liquidated demand or as liquidated damages.

If a claim is liquidated, then Default Judgment may be permitted without further hearing. In that case, the Default Judgment and Bill of Costs Form, found at https://albertacourts.ca/court-of-

queens-bench/publications-forms/microsoft-word-forms-for-lawyers, is filed with the Court, and processed by a Clerk and Assessment Officer, rather than a judge.

Unliquidated claims require an *ex parte* application for an assessment of damages, heard by a Justice, and generally supported by affidavit, although oral evidence is possible, pursuant to the procedure for admitting oral evidence (trial or Special Chambers with *viva voce* evidence). Rule 3.37(3) permits the Court to pronounce a judgment, make any necessary order, direct a determination of damages, adjourn and request additional evidence, dismiss the claim or a part of it, direct that the claim proceed to trial upon notice to the other defendants (where some defendants defend), and/or make a costs award (Rule 3.37(2) mandates a cost award).

Default judgment or a noting in default can be **set aside** pursuant to Rule 9.15(3), in a process known as "opening up a default judgment". Courts have broad discretion in determining whether to set aside, which can be on terms that the Court considers just.[185] Defendants must show that:[186]

a) They have an arguable defence. A simple claim to have such a defence is insufficient, whether there is a triable defence must be evaluated;[187]
b) They did not deliberately let judgment go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and
c) After learning of the default judgment, they moved promptly to open it up. "[U]sually if a defendant deliberately allows a default judgment to go against him, knowing the effect of failing to defend, he will not be allowed to set aside the default judgment."[188] However, "mere delay will not be a bar to the application unless an irreparable injury will be done to the Plaintiff, or the delay has been wilful."[189]

Rule 3.42 prohibits default judgment where the defendant has applied to set aside, amend, strike out, or stay the action or application.

[185] *Bank of Montreal v Maza Investment Group Ltd*, 2012 ABCA 112 at para 5.

[186] *Alberta v Fjeld*, 2008 ABQB 558; 459 A.R. 272, at para. 16; *Palin v Duxbury*, 2010 ABQB 833 at para 21.

[187] *Goulet v da Silva*, 2002 ABQB 369, 313 AR 32 (QB) at para 55.

[188] *Edwards v Ferris*, 2001 ABQB 1125, 316 AR 40 at para 13.

[189] *Goulet v da Silva*, 2002 ABQB 369, 313 AR 32 (QB) at para 72.

Where a party is represented by a litigation representative, Rule 3.36(2) requires that default judgment be by way of application.

Rule 3.34 permits the filing of a Demand for Notice in Form 13, which does not permit a party to defend, but entitles them to receive notice of any steps taken in the action. It must be filed before the same deadline that a Statement of Defence would have been required to be filed. However, defendants can test quantum by cross-examining the plaintiff and their witnesses, and if necessary, adduce evidence on the question of damages not going to the issue of liability.[190]

Practice tips

The commentary to Rule 7.2-1 of our Code of Conduct states that lawyers "should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client". However, extensions must still be requested.

If an extension is not granted, a party can bring an Application pursuant to Rule 1.4(2)(h), which permits the court to "adjourn or stay all or part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order".

In the family law context, a liquidated demand will likely only occur where there has been an agreement, such as a debt, promissory note, Minutes of Settlement, Separation Agreement, Cohabitation Agreement, Pre- or Post-nuptial Agreement, or Unanimous Shareholders' Agreement. However, the consequences of the clerks determining that your claim is unliquidated will only be that they will not permit default judgment. In the case of a complex claim for division of property, summary judgment (upon separation of the divorce proceedings, not to be confused with severance) or a summary trial may be necessary.

See "Substitutional Service" at page 108 of this Manual.

See "Service *Ex Juris*" at page 102 of this Manual.

[190] *Chiste v Northern Electric Co* (1978), 7 Alta LR (2d) 183 (Alta QB) at 187-8; *Bell v Grande Mountain Apartments* (1984), 50 AR 372 (Alta QB); *Swain v McLachlan*, 2016 ABQB 8 at para 10.

PARENTING COORDINATION

Parenting Coordination is essentially a form of mediation, typically with either a psychologist or a lawyer, which may or may not also permit the third party to arbitrate should mediation be unsuccessful. If there is an arbitration component, the draft form of Order set out at Appendix B to Practice Note 7 should be utilized.

Law

Parenting Coordination may be ordered pursuant to Practice Note 7. In *Family Law Act* matters, section 97 permits a mediator or neutral third party to be appointed.

Arbitration, including Parenting Coordination through Practice Note 7, must always be with the consent of both parties.[191] A court cannot force parties to arbitrate.

Parenting Coordinators may resolve child support issues if authorized by agreement or Order.[192]

Parenting Coordinators may not override any Court Orders.

Decisions may be challenged pursuant to section 13 of the *Arbitration Act*.[193]

Practice tips

Parenting Coordination can be either with or without arbitration. Some psychologists use the term "Parenting Coordination" to automatically encompass an arbitration component, and others will only conduct Parenting Coordination where they are permitted to arbitrate pursuant to a Court Order under Practice Note 7.

[191] *Durocher v Klementovich*, 2013 ABCA 115 at para 15.

[192] *Kohut v. Kohut*, 2015 ABQB 48 at para 44; arbitrator's jurisdiction over child support in general also endorsed in *Scheidt v Scheidt*, 2014 ABCA 24.

[193] *Kohut v. Kohut*, 2015 ABQB 48 at para 45.

PRACTICE NOTE 7

Practice Note 7 sets out several potentially-useful psychological services which may be ordered by the Court. None of these procedures will provide a psychologist's opinion as to which parenting arrangement is in the children's best interests. Only a Bilateral Assessment can provide such an opinion, which is typically pursuant to Practice Note 8. Psychologists will usually report significant non-cooperation to the court, meaning that clients should follow the psychologist's directions very closely. Special attention should be paid to the terms of the court order authorizing the service, for example counsel are usually prohibited from distributing copies of reports to clients. Generally, orders authorizing these services will include time limits, for example 10 hours. As psychologists' rates for court services are usually around $300 per hour, this means that these services are usually much less expensive than a Practice Note 8 Bilateral Assessment, of which the cost often exceeds $20,000. A form of Intervention Order is set out at Appendix A to Practice Note 7.

Triage

Permits a psychologist to recommend the type of intervention that may best meet the needs of that family, which may include another Practice Note 7 or 8 procedure, a recommendation to obtain additional information, or to identify the issues or needs which need to be addressed. Triage is especially effective in the case of self-represented litigants.

Voice of the child report

Often involves an interview of the parents, and multiple interviews of the children, typically arranged so that the child is interviewed at least once after the child has been in each parent's care for more than 24 hours. This may identify special needs or risk factors, and may include a medical opinion. The views and wishes of the children are also often expressed. Psychologists will often identify whether they have observed any indicia that the children have been influenced by either parent.

Where there is a significant and demonstrable concern of alienation, or the Voice of the Child Report discloses indicia of improper influence, a Practice Note 8 assessment may be more appropriate. An

expert or diagnosis is required to establish parental alienation syndrome, however an expert report is not always necessary to establish alienation.[194]

These reports are particularly useful in the case of children in their teens whose wishes may be a significant factor, in relocation disputes where *Gordon v Goertz* may mandate a consideration of the children's views, or in cases where children of any age have expressed significant concerns about a parent's parenting ability or incidents which have occurred.

Special attention should be paid to the terms of the Order, especially since counsel are usually prohibited from distributing a copy of the report to clients.

Alternatively, see "Independent Counsel" at page 61 of this Manual, which are particularly useful in situations of high parental conflict or where parenting time or conditions are likely to change, in which case multiple Voice of the Child Reports may be cost prohibitive.

Parent psychological evaluation

A psychological evaluation is often in the form of a **risk assessment**, frequently where supervised parenting or overnight access are at issue. A risk assessment may be required in the case of parental conflict, violence, or substance abuse. They typically involve a series of psychological tests, and an opinion as to whether the allegations claimed, if true, would pose a material risk to the children.

Risk assessments are often useful when representing a parent who is alleged to pose a risk of harm to the child, especially if the conflict relates primarily between the parents, as in those cases psychologists often confirm whether or not the conflict appears to be isolated to the parents and poses no significant risk to the child, which may be sufficient to resolve a dispute.

A psychological assessment might not be sufficient to determine whether a person has minimum threshold parenting ability.[195] This may require a Practice Note 8 Assessment.

[194] *VMB v KRB*, 2014 ABCA 334.

[195] *Gould v Gould*, 2010 ABQB 481.

Therapeutic interventions

Interventions generally relate to a process whereby a psychologist meets with one parent, both parents, the child(ren), or a combination thereof. They are often useful to address urgent parenting issues (eg a child recently refusing to see a parent), to help to develop healthier co-parenting practices, to build a Parenting Plan, or to address unhealthy parenting practices. A separate psychologist may be appointed for the child, and in cases of extreme conflict, significant concerns pertaining to mental health, or a history of violence, separate psychologists may also be appointed for each parent, with joint sessions including both psychologists. Psychologists will generally report to the court about agreements reached, progress made, or impediments to progress. These insights can be useful, especially where one parent is impeding the process. Although they are essentially a type of counselling or mediation, they are generally short term, such as 10 hours. Ordinary joint counselling outside of the court process may be less expensive for less severe cases where reporting to the Court is not required. Formal Parenting Coordination, especially with arbitration, may be more useful in cases of ongoing high parental conflict. A form of Intervention Order is set out at Appendix A to Practice Note 7.

See "Brief Conflict Intervention" at page 18 of this Manual.

Reunification therapy

This process is generally used where a parent and child have not had contact for an extended period of time, or their relationship is significantly strained. It provides a safe space for them to interact, which can be especially useful if the child has only heard negative comments about the other parent and is afraid to see them on their own. This process may also include multiple psychologists.

Parenting Coordination

See "Parenting Coordination" at page 80 of this Manual.

Other

Courts are also authorized to order education sessions or mediation. See "Courses" and "Parenting Coordination", which are discussed at pages 33 and 80 of this Manual, respectively.

Courts may order any other form of intervention they consider appropriate in the circumstances, such as multidisciplinary teams, facilitated planning meetings, group therapy, or ethno-cultural-specific models such as peacemaking or family group decision-making.

PRACTICE NOTE 8 (BILATERAL/UNILATERAL PARENTING TIME/RESPONSIBILITY ASSESSMENTS)

Law

Practice Note 8 sets out the process whereby a psychologist or social worker can render a Parenting Time/Responsibilities Assessment. Either both parents are assessed (bilateral) in order to assist the court in determining the parenting arrangement that would be in the best interest of the children, or where a parent's parenting ability/skills are of concern, the assessment may only be in relation that parent (unilateral).

A form of Order is set out at Appendix 2 to Practice Note 8. Special attention should be paid to the terms of the Order, especially since counsel are usually prohibited from distributing a copy of the report to clients.

These reports can be challenged, even at trial. Challenges often consist of undermining evidence and assumptions on cross-examination, indicating significant changes in circumstances since the assessment, alleging a delay between the assessment and trial, reliance upon facts not proven at trial, negative conclusions based on the circumstances of the marital breakdown and not on actual testing results, and that an expert is not properly qualified.[196] Admitting the expert's opinion does not prove the underlying facts, especially on issues of credibility or where undue weight is given to an opinion premised on unproven facts or inadmissible evidence.[197] These rules apply at both chambers and trial.[198]

The decision in *A.J.U. v. G S.W.*, 2015 ABQB 6 sets out recommended guidelines at paragraph 175:

a) Trial should be scheduled concurrently with ordering of the report, and held within 6 to 9 months of the assessment;

[196] *A.J.U. v. G S.W.*, 2015 ABQB 6 at paras 95 to 134, 175.

[197] *A.J.U. v. G S.W.*, 2015 ABQB 6 at paras 136, 148, 177.

[198] *A.J.U. v. G S.W.*, 2015 ABQB 6 at para 180.

b) The scope and discussions of documents to be reviewed should be discussed in advance;
c) All documents reviewed by expert should be admitted into evidence through Agreed Exhibit Book;
d) The expert should be aware of which witnesses will testify at trial, and important witnesses such as new partners and witnesses going to credibility should testify, otherwise the party with control over that witness should face an adverse inference, or a party who controls a material document should face an adverse inference if not produced;
e) The expert should not receive or review inadmissible evidence such as eavesdropped phone calls or hacked emails;
f) The report should outline which documents were reviewed and which people were interviewed;
g) On request, the expert should provide a complete copy of their file to counsel, except psychological test data, although this should be to terms of the enabling Order; and
h) The expert should give evidence after all witnesses have testified, if possible.

Practice tips

As psychologists and social workers are bound to ethical standards of practice by their regulatory bodies, Practice Note 8 assessments tend to be very rigorous and time consuming. Sufficient data must be gathered before a proper opinion in relation to parenting time can be rendered. In some cases, even after a full analysis a concrete recommendation is not available. Given the often prohibitive cost of a bilateral assessment, a procedure under Practice Note 7 may instead be preferable. Generally it will only be ordered where the parties have the means to pay for it.

Bilateral Assessments usually consist of several interviews with each parent, observing parenting in each household, interviews with significant others, interviews with other psychologists or counsellors, interviews with collateral contacts, and conducting and analyzing psychological testing. They often take half a year to a year to complete.

To challenge such an expert, a **rebuttal** report should be completed and entered using Form 25. The person providing the rebuttal must still be qualified as an expert. The purpose of the rebuttal is

meant to be a critique or review, not a second opinion.[199] A useful suggested guideline for rebuttal reports can be found at *LAU v IBU*, 2016 ABQB 74 at paras 137, 138.

If using an expert who is not as experienced in preparing these reports, it may be useful to search the cases for a mention of their name, in case any courts have declined to qualify them as an expert.

PRESERVATION ORDERS AND DISSIPATION

Law

Rule 6.25 permits the court to order for the preservation or custody or property that is in dispute or that may be evidence in an action. The Court may also order that an amount in dispute or security be paid into the Court. If the property is perishable, likely to deteriorate, likely to lose its value, or for any other reason should be sold, the Court may also order that property be sold and the proceeds paid into court. The Court may also permit entry upon land or premises to carry out an order.

Orders freezing all of a party's assets are extraordinary in nature.[200] Our Court of Appeal has stated "[t]hey are not to be granted routinely, and the mere fact that a spouse is in default of some payments is not a sufficient reason. Some sort of special circumstance is generally required, for example, an evidence-based reason to believe that the spouse is dissipating assets, or moving assets offshore, or will be defiant of the court process".[201]

A preservation order in a family law dispute may be granted against a corporation controlled by a party.[202]

An attachment order pursuant to section 17 of the *Civil Enforcement Act* could also be applicable, which lists additional remedies.

Alternatively, an application may be made under Rule 6.26 to inspect property, take samples, make observations, undertaking experiments, and to enter land or premises to carry out such an order.

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[199] *LAU v IBU*, 2016 ABQB 74 at paras 135, 136.

[200] *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2 at 11.

[201] *Frank v. Beaver*, 2016 ABCA 35 at para 20.

[202] *Peregrym v. Peregrym*, 2015 ABQB 176 at paras 377-383.

If without an order, a party attempts to sell to a person who is not a bona fide purchase for value, or to make a substantial gift of property that may defeat a property claim of the other, an application can be made to prevent the sale or gift under section 34 of the *Matrimonial Property Act*.

Practice tips

An application for a Preservation Order may be brought *ex parte*. This is particularly useful where it is possible that funds will be spent prior to an order being granted, which usually results in no recourse, and can be incredibly frustrating.

Division of property may not be equal where matrimonial property has been dissipated.[203] This means that an application for a Preservation Order may be unnecessary where there are otherwise resources available to satisfy your client's share of property.

The *Matrimonial Property Act* does not prevent the court from mounting a challenge as a fraudulent conveyance or fraudulent preference, especially during the unmarried portion of the relationship.[204]

Dissipation may also be addressed through spousal support.[205]

An order to inspect and enter premises may be useful in the context of obtaining a valuation of land or a business.

See also "Third party transferees (s 10 of the *Matrimonial Property Act*)" at page 118 of this Manual.

PRIVILEGE

Law

Whether or not a record is privileged is governed by the four branches of the "Wigmore test":[206]

1. The communications must originate in confidence;

[203] *Matrimonial Property Act*, s 8(l).

[204] *Milavsky v. Milavsky*, 2015 ABQB 395 at para 59.

[205] *Shaw v. Shaw*, 2015 ABCA 11 at para 9.

[206] Cited at *LMB v IJB*, 2005 ABCA 100 at para 26.

2. Confidentiality must be essential to the full maintenance of the relationship between the parties;
3. The relationship must be one which in the opinion of the community should be sedulously fostered; and
4. The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. The fourth branch of the test requires the judge to consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the litigation.[207]

Litigation privilege applies to records made "in contemplation of privilege". It applies to records created with the dominant purpose of litigation.[208] This contemplates multiple purposes. The onus of proving that privilege applies rests with the party asserting privilege.[209] Seven principles are identified in *Ernst & Young Inc v Central Guaranty Trust Co*, 1998 ABQB 226 at para 8:

1. The litigation privilege is completely separate from the privilege from communications to or from a lawyer to get or receive legal advice. One does not need both situation to claim the privilege; either one will suffice.
2. While precedents are useful to establish the legal principles, each case is fact specific.
3. "The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. … Thus at the time of creation preparation for litigation must be the dominant purpose."
4. The concept of dominant purpose assumes that creation of a document may be motivated by more than one intention. There is no reason in principle by servient purpose of use in litigation cannot mature into the dominant purpose as the underlying investigation progresses and external events change.

[207] *M(A) v Ryan*, [1997] 1 SCR 157 at para 16.

[208] *Nova v Guelph Engineering Company*, 1984 ABCA 38.

[209] *Moseley v Spray Lakes Sawmills (1980) Ltd*, 1996 ABCA 141 at para 26.

5. The party claiming privilege must establish that at the time of creation the dominant was used in litigation. The test is a strict one.
6. The onus of proving that the privilege applies rests squarely on the person claiming the privilege.
7. The dominant purpose at the time of creation should not be determined from subsequent events which might indicate that the statement becomes useful for litigation.

Offers to settle between parties or their counsel are often labelled **"without prejudice"**, however Litigation privilege automatically applies to all communication in furtherance of settlement, regardless of whether or not it is actually labelled "without prejudice", and this privileged information should not be disclosed to the court, unless to prove the fact and contents of a settlement if a settlement is reached, or to address costs after a decision is rendered.[210] The mere fact that a document is labelled "without prejudice" is not determinative, nor is the lack of such a label.

Solicitor-client privilege applies to any communication between a client and a solicitor, which entailed the seeking or giving of legal advice, and to which the client intended to be confidential.[211] Confidentiality is the usual expectation in communications between solicitors and their clients.[212] Solicitor-client privilege exists even before the formal retainer is established.[213]

Waiver of litigation privilege will only be established in the clearest of cases.[214] Waiver can be made expressly or by implication, but it must be voluntary. Evidence obtained through a Questioning is not a waiver, as it is not obtained voluntarily.[215] Partial waiver (eg disclosing one document out of a group) does not create a blanket waiver.[216] Disclosing a privileged record to a third party can waive

[210] *Leonardis v Leonardis*, 2003 ABQB 577 at para 3.

[211] *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 at para 15.

[212] *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 634 at para 58.

[213] *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 893.

[214] *Scott & Associates Engineering Ltd v Ghost Pine Windfarm LP*, 2011 ABQB 339 at para 53.

[215] *Gault Estate v. Gault Estate*, 2016 ABQB 53 at para 27; *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 634 at para 64.

[216] *Gault Estate v. Gault Estate*, 2016 ABQB 53 at para 30; *O'Scolai v Antrajenda*, 2008 ABQB 77 at para 16.

privilege, but not if the disclosure was unauthorized.[217] However, payments made by cheque to lawyers or accountants are not themselves privileged.[218] Implied waiver occurs where a party:[219]

1. Voluntarily puts its state of mind at issue in the litigation;

2. Relied upon privileged communications to ground its claim or base its defence; and

3. Attempted to support a good faith argument using undisclosed advice from counsel.

Practice tips

It is permissible to inquire as to the amounts paid to the opposing counsel. This could be relevant towards dissipation, advance costs, funds available for support, and self-sufficiency.

It may be permissible to attach a letter from counsel marked "without prejudice" as an Exhibit to an Affidavit where it is being used as evidence of an agreement if an agreement is clearly reached, but all other information within such letter should be redacted.

If attaching your own letters as Exhibits, unnecessary portions should be redacted to maintain litigation privilege.

Even if a letter or document is not expressly labelled "without prejudice", litigation privilege may still apply. A solicitor's omission to label an offer "without prejudice" does not mean that it can be referred to in court.

Litigation privilege does not apply only to communication between lawyers. Clients, or any other person, can assert litigation privilege.

Both parties can still agree that records otherwise barred by litigation privilege can be admitted, although ideally such agreement should be in writing.

[217] *Syncrude Canada Ltd v Babcock & Wilcox Canada Ltd*, 1992 ABCA 300.

[218] *Gault Estate v. Gault Estate*, 2016 ABQB 53 at para 32.

[219] *Angus Partnership Inc v Salvation Army*, 2011 ABQB 512 at para 10.

PUBLICATION AND BROADCAST BANS

Law

An application to ban publication, seal a court file, or permit use of a pseudonym, is known as a **restricted court access order**. These applications are governed by Rule 6.31 and Division 4 of Part 6 of the Rules, and must be filed and served on every party using Form 32, at least 5 days before any scheduled hearing, trial, or proceeding for which the order is sought. Such an application must be brought to the judge assigned to the hearing, trial, or proceeding, or where a judge has not been assigned, to the case management judge, or if neither apply to the Chief Justice or a judge designated by the Chief Justice. Pursuant to Rule 6.34, an application to seal or unseal court files must be filed and heard by the Chief Justice or a judge designated by the Chief Justice. Rule 6.30 requires that the judge be empowered to grant such a restricted court access order pursuant to a statute or at common law. Information that is the subject of the restricted court access application may not be published until the application is dismissed, due to Rule 6.36. The filed order is then served on the Court Clerk, who circulates the notice to the media pursuant to Rule 6.32.

Pursuant to section 100 of the *Family Law Act*, courts in *Family Law Act* matters also have the discretion to prohibit the publication or broadcast of any report of a proceeding that may identify the child.

See Rules 6.28 to 6.36.

Practice tips

A draft Family Practice Note 10 has been circulated and can be found at https://www.albertacourts.ca/docs/default-source/Court-of-Queen%27s-Bench/draft-fpn-10-forfeedback.pdf Instead of forcing a separate application for a publication ban or sealing of the court file, this proposed Practice Note would permit third parties to access the procedure card and scheduling information, but would require that 30 days' notice be served upon the parties and their counsel before any further information from the court file is released, during which time an application for restricted court access may be brought. This would apply to all matters under Part 12, including matters relating solely to property. However, as written judgments would presumably still be available to the public, a restricted court access order may still be desirable, particularly where there are minors and sensitive allegations.

REQUEST FOR PARTICULARS

Law

A Request for Particulars may be served pursuant to Rule 3.61. If a response is not received within 10 days, the party may apply to the Court, and the Court may specify within which time the particulars must be provided. However, Rule 3.61(4) states that Rule 3.61 does not extend any timelines for filing pleadings, which means that it does not postpone the obligation to file a Statement of Defence.

Where a defendant has exclusive possession of all relevant knowledge, the Court may postpone a requirement to supply the relevant particulars until after Questioning for Discovery.[220]

Practice tips

A Request for Particulars is meant to clarify a claim in a pleading, typically to assist with the drafting of a Statement of Defence, although it is often sent strategically (eg to compel a party to list their exemptions claimed or details of an unjust enrichment claim). The request is usually written within a letter which specifically refers to Rule 3.61. For example:

> "Pursuant to Rule 3.61, the Defendant hereby requests particulars of the alleged dissipation set out at paragraph 14 of the Statement of Claim. Rule 3.61 requires that you respond within **10 days** of receiving this request, so that we may properly draft our Statement of Defence."

This Rule is not for obtaining evidence, it is only for determining what allegations are being made, which will be proven at trial.

A response to a Request for Particulars may be that sufficient particulars have already been provided, or that the particulars are in the sole knowledge of the defendant.

Even though Rule 3.61 doesn't automatically extend filing deadlines, you can still request an extension.

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[220] *Tomkow v Oldale* (1980), 118 DLR (3d) 755 at para 15.

RUSH DIVORCE

Law

A process was set out at page 21 of the June 1, 2010 Consolidated Notices to the Profession.

The Edmonton Court Clerks have recently advised that expedited/rush divorces are not currently available in Edmonton due to a shortage of clerks.

Practice tips

Where expedited/rush divorces are unavailable, the following tactics may be useful:

1. Bring a severance application or obtain a Consent Order for severance as soon as possible, in case the remainder of the separation is not resolved, and because the court is more likely to approve the form of Divorce Judgment if there are no corollary relief issues to address. See "Severance" at page 103 of this Manual;

2. If each party files an Undertaking not to Appeal Divorce Judgment, the divorce can be made effective on the date that the Divorce Judgment is granted, so that the 30 day appeal period will not apply and the Divorce Certificate can be obtained immediately. The divorce judgment must state that it will take effect on the date that it is pronounced. The Affidavit of Applicant should list the special circumstances necessitating a shortening of the appeal period. See https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/undertaking-not-to-appeal-divorce-judgment.pdf?sfvrsn=2; and

3. A joint divorce may be processed faster.

SALE AND PARTITION OF LAND

Law

A co-owner of land can apply to sell all or part of the land, to sell all or part to one of the other owners if they are willing to purchase, or to physically divide the land, through section 15 of the *Law of*

Property Act. Whether or not such a sale occurs is entirely at the discretion of the hearing judge.[221] A co-owner includes both joint tenants and tenants in common, unless holding for common beneficiaries.[222]

If the court is asked to consider an unequal distribution under the *Law of Property Act* (rather than under the *Matrimonial Property Act* or principles of unjust enrichment), at least the following factors must be taken into account:[223]

a. One co-owner has excluded another co-owner from the land;
b. An occupying co-owner was tenant, bailiff or agent of another co-owner;
c. A co-owner has received from third parties more than the co-owner's just share of the rents from the land or profits from the reasonable removal of its natural resources;
d. A co-owner has committed waste by an unreasonable use of the land;
e. A co-owner has made improvements or capital payments that have increased the realizable value of the land;
f. A co-owner should be compensated for non-capital expenses in respect of the land;
g. An occupying co-owner claiming non-capital expenses in respect of the land should be required to pay a fair occupation rent;
h. A co-owner has at the time the application is made under this Part rights in the land for which the co-owner would receive compensation under the *Dower Act* if an order had been made under that Act dispensing with that co-owner's consent to the disposition of that land.

If the land is a "matrimonial home" as defined by the *Matrimonial Property Act* (Alberta) or a "family home" as defined by the *Family Law Act* (Alberta) (see "Exclusive Possession" at page 46 of this Manual), the Court may stay proceedings under the *Law of Property Act* pending resolution of proceedings for matrimonial property division or exclusive possession.[224]

[221] *LPA* s 15(3).

[222] *LPA* s 14(a).

[223] *LPA* s 17(2); see *Klein v. Wolbeck*, 2016 ABQB 28 at paras 214-247 for useful application of the factors.

[224] *LPA* s 21.

It can be premature to direct the sale of property where there are unresolved property issues.[225] These provisions only apply to co-owned land, not business interests or chattels. A party could seek an interim distribution of property prior to trial, however such an application is likely too complicated and uncertain to deal with in chambers.[226]

In one decision, the Court ordered a "shotgun clause", wherein within 6 months either spouse could make the other an offer, and if the other party did not beat the offer, the first offer would prevail.[227] In that decision, the Court also stated that the shotgun clause would not be in effect if either party set the matter for a property distribution hearing before the expiration of the 6 month period.

In another decision, the Court permitted a spouse to buy from a bankruptcy spouse, and adjusted for several factors such as occupation rent.[228]

Service of such an application is extended to at least 10 days, and the application must also be served on any other co-owners, any registered encumbrances to the Title, and any other person that the Court may direct.[229] Such persons become a party to the action. An unregistered encumbrancer may still apply to become a party to the action.

Practice tips

In matrimonial property and unjust enrichment proceedings, the *Law of Property Act* is often the authority to sell land prior to a trial, however the factors in considering an unequal distribution likely won't be applicable as the distribution of sale proceeds under the *LPA* will likely be stayed in favour of the matrimonial property or unjust enrichment proceedings.

Where there will be no matrimonial property division or unjust enrichment claim, an originating application under the *Law of Property Act* (Alberta) could be brought in civil chambers.

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[225] *Veselic-Titheridge v Titheridge*, 2007 ABQB 456 at para 37; *Priest v Priest*, 2011 ABQB 294 at paras 18-19; *Rarog v Rarog*, 2007 ABQB 98 at para 28.

[226] *Von Sass v. De Ruiter*, 2016 ABCA 299.

[227] *Grunenwald v Grunenwald*, 2006 ABQB 186 at paras 37-40.

[228] *Boutin v Viau*, 2007 ABQB 451 at paras 3, 24-31.

[229] *LPA* s 25.

It may be desirable to concurrently seek terms such as maintaining the house in a sale condition, permitting access to the realtor and potential purchasers, and permitting access to an appraiser.

After the land is ordered to be sold, a separate application may be required to approve an offer, unless an acceptable sale price is set in the Order. As the Order is a public record it may not be desirable to set a minimum price. Often, whether an offer is acceptable will be either agreed upon, or a party may obtain an appraisal. Alternatively, a Notice to Admit could be served. Even if there are several offers, the Court may still refuse to accept any of them if below market value.[230]

An order accepting an offer may want to specify how sale proceeds are to be distributing (conveyancing fees, mortgages, HELOCs, other financial encumbrances, property taxes, realtor's commission, condominium fees, GST if applicable, or potentially a holdback for undetermined liabilities). The remaining net sale proceeds would usually be paid into a solicitor's trust account on the express trust condition or undertaking that the funds not be distributed until further agreement or Order, or they may be directed to be paid into court. It is possible to apply for interim distributions of such funds, subject to the aforementioned constraints.

Although section 19 of the *LPA* permits the Court to sever the joint tenancy to create a tenancy in common, the same can be accomplished by simply service notice through section 65 of the *Land Titles Act* (Alberta). Severing a joint tenancy is particularly useful where there is a high risk that a party may die prior to the resolution of the matter, as the surviving joint tenant might otherwise be able to exercise their right of survivorship to place the Title into their sole name.

When ordering partition and sale, dower rights are dispensed with.[231]

This remedy is not available to persons who are not on Title. However, section 9(3)(d) of the *Matrimonial Property Act* permits the Court to direct a sale when making a property distribution.

Section 15 contemplates subdivision as a potential remedy. A surveyor can provide additional guidance and expected costs. The Alberta Land Surveyors' Association publishes materials to educate about the subdivision process. See http://www.alsa.ab.ca/PublicInformation/Subdivisions.aspx

[230] *LPA* s 16.

[231] *LPA* s 20.

Exclusive possession can also be granted pursuant to an Emergency Protection Order, which is beyond the scope of this paper. However, it may be desirable for the EPO to state that such exclusive possession is without prejudice to the application of either party under the *MPA*, *FLA*, or *Law of Property Act* for either exclusive possession of partition and sale.

It may in some cases be desirable to concurrently bring an application for exclusive possession of a home in the event that partition and sale is not granted. See "Exclusive Possession" at page 46 of this Manual.

The Order for Sale precedent located at Appendix "H" to this paper is based on orders used in relation to foreclosures.

SECURITY FOR COSTS

Law

Rule 4.22 permits a court to order security for costs, where it considers such an order to be just and reasonable to do. The Court must take into consideration the following factors:

a. whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
    - Does the party have assets in Alberta?
b. the ability of the respondent to the application to pay the costs award;
    - Are they impecunious, after taking into account property division and support?
    - It is the obligation of the respondent to adduce evidence of their ability to pay a costs or security for costs award.[232]
    - Reference can be made to either a *pro forma* Bill of Costs or Schedule C.[233]
    - Accounts receivable may not be sufficiently liquid.[234]
c. the merits of the action in which the application is filed;

[232] *Autoweld Systems Limited v. CRC-Evans Pipeline International, Inc.*, 2011 ABCA 243 at paras 14-18.

[233] *Autoweld Systems Limited v. CRC-Evans Pipeline International, Inc.*, 2011 ABCA 243 at para 19.

[234] *Butte Farms '87 Ltd v Concord Inc*, 2005 ABQB 341.

d. whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action; and

e. any other matter the Court considers appropriate.

- It may not be appropriate to award security for a Counterclaim where it is intimately interwoven with the issues in the Statement of Claim.[235]
- Factors favouring the granting of a security for costs order include:[236]
    a) the respondent is a corporation and has no assets in Alberta;
    b) the respondent is a corporation and the assets it has in Alberta are of a nature or value that there is a substantial risk that the applicant may not be able to recover any costs award likely to be granted to it;
    c) the likelihood the respondent will receive judgment against the applicant is low;
    d) a security for costs Order will not prevent the respondent from prosecuting its action;
    e) the applicant is not seeking security for steps already taken;
    f) if the applicant has counterclaimed, and the issues raised by the counterclaim and the claim are different, this will not deter a court from granting security for costs;
    g) the applicant has applied for a security for costs Order at the earliest opportunity; and
    h) the resolution of the issues presented by the respondent's action is not important to the greater community.
- Factors weighing against the granting of security for costs order include:[237]
    a. the applicant failed to apply for security for costs at the earliest opportunity;
    b. the applicant seeks security for costs of steps already taken;

[235] *Attila Dogan Construction v AMEC Americas Ltd.*, 2011 ABQB 175 at para 21.

[236] *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 at para 74; cited in *Commercial Construction Supply Ltd v Ghost Riders Farm Inc*, 2016 ABQB 166 at para 23 and *Provalcid Inc v Graff*, 2014 ABQB 453.

[237] *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 at para 75; cited in *Commercial Construction Supply Ltd v Ghost Riders Farm Inc*, 2016 ABQB 166 at para 24 and *Provalcid Inc v Graff*, 2014 ABQB 453.

c. the respondent has assets in Alberta of a nature and value that there is little risk the applicant will be unable to recover any cost award likely to be granted to the applicant;
d. the likelihood the respondent will receive judgment against the applicant is high;
e. the shareholders of a corporation, which has no assets in Alberta or the assets it has in Alberta are of a nature and value that there is a substantial risk the applicant may not be able to recover any costs award likely to be granted to it, have assets in Alberta that would be sufficient to meet any costs award likely to be granted and have offered to provide personal guarantees;
f. a security for costs Order will prevent the respondent from prosecuting its action;
g. the applicant has counterclaimed and the issues raised by the counterclaim and the claim are the same or the counterclaim adds significantly to the action, with the potential to prolong discoveries and trial; and
h. the resolution of the issue presented by the respondent's action is important to the community.

Unless the Court orders otherwise, such an Order must:

1. specify the nature of the security to be provided, which may include payment into Court;
    - Costs can be ordered to come out of the party's share of matrimonial property.[238]
2. require a party to whom the order is directed to provide the security no later than 2 months after the date of the order or any other time specified in the order;
3. stay some or all applications and other proceedings in the action until the security is provided; and
4. state that if the security is not provided in accordance with the order, as the case requires,
    a. all or part of an action is dismissed without further order, or
    b. a claim or defence is struck out.

[238] *Deguchi v. Deguchi*, 2013 ABCA 61 at paras 18-19.

Security for costs should cover the probably costs of the suit.[239] However, security for costs on a solicitor-client basis may be awarded where it is likely that the costs will be awarded on a solicitor-client basis.[240]

Per Rule 4.23(2), if the security is given by bond, the bond must be given to the party requiring security unless the Court orders otherwise. Rule 4.23(3) states that if the security is given by money paid into the Court, the money may by agreement of the parties be paid out, and a bond substituted for it.

Rule 14.67(1) permits a single judge of the Court of Appeal to award security for costs.

Practice tips

Several family law decisions have granted security for costs.[241]

The form of the security is typically a payment of a certain amount into court, payment into a solicitor's trust account on trust conditions that it not be released until further order or agreement, deposit of property or shares, a third party guarantee, letter of credit, a party may post a surety bond, a mortgage or lien, or they may obtain an irrevocable letter of credit for a certain amount.

This is typically where there is reason to believe that a person won't be able to pay a costs award. For example where they have failed to pay costs in the past, or they are not residents of Canada (in other provinces there are usually reciprocal enforcement agreements).

This is different from an order for advance costs. An order for advance costs "is designed to place in the hands of the moving party the funds needed to pay for some of the moving party's litigation costs", whereas a security for costs order "increases the likelihood that the moving party will be able to collect any costs awarded against the nonmoving party".[242] The most significant difference is that

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[239] *ArcelorMittal Tubular Products Roman SA v Canadian Natural Resources Ltd*, 2010 ABQB 552 at para 31, 503 AR 391; *Pocklington Foods Inc v Alberta (Provincial Treasurer)*, 153 AR 288 (ABQB) at para 20; *Home Exchange (Alberta) Ltd v Goodyear Canada Inc*, 2001 ABQB 673 at para 14, 291 AR 295

[240] *Hamza v Hamza*, 1997 ABCA 263 at para 17, 200 AR 342; *Canada Deposit Insurance Corp v Canadian Commercial Bank*, 1989 ABCA 150 at paras 24 – 26, 61 DLR (4th) 161; P*rairie Land Corp v Concert Properties Ltd*, 2004 ABQB 726 at para 14, 364 AR 283.

[241] For example, *Tarapaski v. Tarapaski*, 2009 ABCA 58; *Dhala v. Dhala*, 2006 ABCA 334 at para 13; *McDonald v. McDonald*, 1998 ABCA 241

[242] *Scott v. Glazebrook*, 2015 ABCA 235 at Note 1.

in relation to security for costs, failure to pay the security may prevent the party from advancing their action.[243]

SELF-REPRESENTED LITIGANTS

Law

Per rule 7.2-12 of our *Code of Conduct*, a lawyer must advise an unrepresented person to obtain independent legal representation, take care to see that the unrepresented person is not proceeding under the impression that his or her interest will be protected by the lawyer, and make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client. The commentary states that the degree will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client, and the nature of the matter.

Particularly where self-represented litigants are involved and there is no agreement or notice, a final decision on property should not be made in Special Chambers.[244]

Practice tips

See *Meads v Meads*, 2012 ABQB 571 for a comprehensive rebuttal of arguments raised by organized pseudo-legal commercial argument (OCPA) litigants and freemen.

Often the best strategy for dealing with self-represented litigants is to be very courteous and to help them understand the process, so that you distance yourself from their dispute with their former partner, while very clearly delineating boundaries such as that you are not providing any legal advice to them and you have to follow your client's instructions. Always recommend that they obtain independent legal advice.

[243] *Scott v. Glazebrook*, 2015 ABCA 235 at Note 1.

[244] *Elsley v Elsley*, 2016 ABCA 189.

SERVICE EX JURIS (OUTSIDE OF ALBERTA)

Law

Service outside of Alberta can be through a method specified in the Rules, pursuant to the laws of the jurisdiction of service, or through a method permitted by the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, if the country of service is a party to the *Convention*.

Before a commencement document can be served in another Canadian province, Rule 11.25(1) requires a real and substantial connection to Alberta, which is set out within the commencement document.

Before a commencement document can be served outside of Canada, Rule 11.25(2) requires that:

1. There must be a real and substantial connection to Alberta;
2. The commencement document must be accompanied with a document or affidavit which sets out the grounds for service outside of Canada (a document could likely be a page titled "Grounds for Service", in the preamble of the Order for service ex juris, or as simple as in paragraph 2 of a Statement of Claim for Divorce, titled "Residency");
3. There must be an application the Court for an Order for service ex juris, which is supported by an Affidavit; and
4. The person served must also be served with the Order for service ex juris.

Pursuant to Rule 11.25(3), a real and substantial connection to Alberta is presumed to exist in circumstances which include but are not limited to the following:

a) the claim relates to land in Alberta;
b) the claim relates to a contract or alleged contract made, performed or breached in Alberta;
c) the claim is governed by the law of Alberta;
d) the claim relates to a tort committed in Alberta;
e) the claim relates to the enforcement of a security against property other than land by the sale, possession or recovery of the property in Alberta;
f) the claim relates to an injunction in which a person is to do or to refrain from doing something in Alberta;
g) the defendant is resident in Alberta;

h) the claim relates to the administration of an estate and the deceased died while ordinarily resident in Alberta;
i) the defendant, although outside Alberta, is a necessary or proper party to the action brought against another person who was served in Alberta;
j) the claim is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
    i. the trust assets include immovable or movable property in Alberta and the relief claimed is only as to that property;
    ii. the trustee is ordinarily resident in Alberta;
    iii. the administration of the trust is principally carried on in Alberta;
    iv. by the express terms of a trust document, the trust is governed by the law of Alberta;
k) the action relates to a breach of an equitable duty in Alberta.

A respondent can apply to set aside service pursuant to Rule 11.31, where service was not effected (ie the person did not actually receive the document), service was not effected due to the person's own avoidance, and the person served would be prejudiced, but must do so prior to filing a Statement of Defence or Demand for Notice. The Court may make any order it considers appropriate.

Practice tips

Note that following the 2010 *Rules*, this Rule was amended again in 2012.

If there is not a real and substantial connection with Alberta (eg the Plaintiff moved here after the separation), then the claim may need to be brought in the other jurisdiction.

These rules only govern service, the opposing party may still argue a lack of jurisdiction, in which case reference must be made to conflict of laws rules.

SEVERANCE AND TRIAL OF AN ISSUE

Law

Rule 12.50(7)(c) permits the Court to sever corollary relief to permit the divorce judgment to be granted, where corollary relief has been claimed but not resolved. In making such a determination,

the Court may make any further order or give any other direction that the Court considers appropriate.

Severance will not always be appropriate, even in matters split between multiple jurisdictions.[245]

Upon application, Rule 7.1, known as "trial of an issue" or "severance" may also permit the court to:

a) Order that a question or issue be heard or tried before, at, or after a trial for the purpose of disposing of all or part of a claim, substantially shortening a trial, or saving expense;
    - If any of those purposes are met, there is a prima facie right to severance.[246]
    - There need not be certainty that one of the three purposes will be met, a "good chance" that one of the three purposes will be met is sufficient.[247]
b) Define the question or issue, or in the case of a question of law, approve or modify the issue agreed by the parties;
c) Stay any other application or proceeding until the question or issue has been decided;
d) Direct that different questions of fact in an action be tried by different modes;
e) IF the Court is satisfied that a determination of a question or an issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may:
    a. Strike out a claim or order a commencement document or pleading to be amended;
    b. Give judgment on all or part of a claim and make any order it considers necessary;
    c. Make a determination on a question of law; or
    d. Make a finding of fact.

If some issues would proceed regardless of validity and trial of an issue would result in unnecessary bifurcation, the Court may deny a request for trial of an issue.[248] A trial should not be bifurcated unless the savings are clear or at least probable.[249]

[245] *Burke v. Burke*, 2015 ABCA 107.

[246] *Envision Edmonton Opportunities Society v Edmonton (City)*, 2011 ABQB 29 at para 100.

[247] *Nowicki v Price*, 2011 ABQB 133 at para 28.

[248] *Smigelski v. Smigelski*, 2015 ABCA 320; *Lakhoo v Lakhoo*, 2014 ABCA 98, leave to appeal to SCC refused, [2014] SCCA No 203.

[249] *Gallant v Farries*, 2012 ABCA 98.

Where the question is an issue of law, the parties may agree pursuant to Rule 7.1(2) on the question of law for the Court to decide, on the remedy resulting from the Court's opinion on the question of law, or on the facts or that the facts are not in issue.

A decision of severance is binding once decided, it cannot be reconsidered upon determination of any of the severed issues.[250]

Rule 7.1(4) specifies that Part 5, Division 2, relating to experts and expert reports, applies, unless the parties otherwise agree or the judge orders otherwise.

Practice tips

Rule 7.1 is also known as "trial of an issue". Trial of an issue is particularly useful where the validity of an agreement is in question, and that agreement would dispose of all issues. See "Enforcing Agreements" at page 42 of this Manual.

Rule 12.50(7)(c) only applies to severance of the divorce and corollary relief. Rule 7.1 applies to severance of an issue. Separating a matter into multiple claims, see "Joining/Consolidating or Separation of Claims and Parties" at page 65 of this Manual.

Severance of the divorce is typically granted where the parties have been separated for many years, or where there is an impending remarriage. If applying due to remarriage and contested, the Affidavit should include documentation to support that funds have been expended to book a date and services, if applicable. Severance may be less likely where there are children and no interim order in place.

If each party files an Undertaking not to Appeal Divorce Judgment, the divorce can be made effective on the date that the Divorce Judgment is granted, so that the 30 day appeal period will not apply and the Divorce Certificate can be obtained immediately. The divorce judgment must state that it will take effect on the date that it is pronounced. The Affidavit of Applicant should list the special circumstances necessitating a shortening of the appeal period. See https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/undertaking-not-to-appeal-divorce-judgment.pdf?sfvrsn=2

[250] *Bailey v. Nelson*, 1987 ABCA 95 at paras 18, 23, 24.

SPECIAL CHAMBERS

Law

Unless leave by the presiding judge is obtained in morning or afternoon chambers, any applications which will take more than 20 minutes in their entirety (including submissions from each party and the decision), must proceed to Special Chambers.

Conflicting affidavits often necessitate *viva voce* evidence. However, an interim decision may be possible where there is sufficient uncontradicted evidence, such as school reports, text messages, medical notes, and child welfare concerns.[251]

Our Court of Appeal has recently emphasized that it is generally inappropriate to make substantial changes in parenting arrangements without the benefit of *viva voce* evidence, except in the case of urgency, and only where it is clearly in the child's best interests.[252]

Practice tips

See the new Practice Note 2 for additional rules.

Can be one hour, a half day, or a full day. One hour is generally only appropriate where there is a single issue in dispute.

If having a longer matter heard in morning or afternoon chambers is desired, the Court may be more willing to hear the matter if a request is made to hear it at the end of the list, after all other matters have proceeded. This means that other parties are not waiting, and by that time it may be apparent that there will be sufficient time to hear the matter.

In Edmonton and Calgary, Confirming Letters are due by 4:00 p.m. on the Wednesday of the week preceding Special Chambers. In Red Deer, confirming letters are due 3 weeks prior to the hearing date, regardless of whether or not there is a cross-application.

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[251] *Konashuk v. Wayland*, 2015 ABCA 196.

[252] *Shwaykowsky v Pattison*, 2015 ABCA 337; *Crawford v Crawford*, 2015 ABCA 376; *HG v RG*, 2017 ABCA 89; *Family Law Practice Note 2*.

It is possible to request "Special Chambers with *viva voce* evidence", with leave. Typically, the oral evidence is based on one or two contested issues, so that the matter can be dealt with in a day. See also "Summary Trials" at page 113 of this Manual.

Available Special Chambers dates can be found at https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/fls-available-hearing-dates.pdf?sfvrsn=1700

STRIKING

Law

Pursuant to Rule 3.68, the Court may strike all or part of or amend a claim, defence, or pleading, enter judgment or an order, or stay an action or application, where:

a) the Court has no jurisdiction;
b) a commencement document or pleading discloses no reasonable claim or defence to a claim. Rule 3.68(3) prohibits further evidence from being submitted;
c) a commencement document or pleading is frivolous, irrelevant or improper;
d) a commencement document or pleading constitutes an abuse of process (for example repeated frivolous actions/applications); or
e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim;
f) Without sufficient cause, a party does not serve an Affidavit of Records as required;
g) Without sufficient cause, a party does not fulfill their continuing disclosure obligations and prepare a Supplementary Affidavit of Records; or
h) Without sufficient cause, fails to comply with an Order pursuant to Rule 5.11 that a record be produced when omitted from an Affidavit of Records.

These determinations are generally made with only reference to the pleadings, not with new Affidavit evidence. However, the Court is not always confined to the pleadings, it is entitled to consider earlier reported decisions and the results of related proceedings.[253]

[253] *HOOPP Realty Inc v The Guarantee Company of North America*, 2015 ABCA 336.

Hunt v Carey Canada Inc, [1990] 2 SCR 959 requires that the Court must accept the facts as alleged in the pleadings as if they were proven, and mandates that striking should be exercised only in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the Court.

Pursuant to Rule 3.68(4)(a), the Court may also strike out all or part of an affidavit that contains frivolous, irrelevant, or improper information. Privileged information should be struck from affidavits.

Practice tips

Striking out entire pleadings essentially removes an action from existence without it having to be resolved by way of trial. Striking part of pleadings only narrows part of the action against a person.

Judges may be reluctant to strike affidavits, and instead rely on counsel to point out their deficiencies at the hearing.

SUBSTITUTIONAL SERVICE

Law

This is an *ex parte* application pursuant to Rule 11.28, which must be supported by Affidavit evidence setting out why service is impractical, proposing an alternative method of service, and stating why the alternative method of service is likely to bring the document to the attention of the person to be served.

Where it is possible to attach documents (generally methods other than advertisement), Rule 11.28(3) requires that a copy of the Order for substitutional service also be served.

In very rare circumstances, it may be possible to dispense with service entirely using Rule 11.29, where service would be impractical or impossible. The supporting Affidavit must state how all reasonable efforts to serve the document have been exhausted or are impractical or impossible, stating why there is no or little likelihood that the issue will be disputed, and stating that no other method of service the document is or appears to be available. However, even where there is no contact information whatsoever, the court may still require a broad method of substitutional service such as advertisement within the last known province of residence of the respondent. Service may

also be dispensed with where the cost would be prohibitive and the application unlikely to be disputed, for example where a parent has not had contact with a child for many years and resides in a country where language barriers or a process server would be prohibitively expensive.

A respondent can apply to set aside service pursuant to Rule 11.31, where service was not effected (ie the person did not actually receive the document), service was not effected due to the person's own avoidance, and the person served would be prejudiced, but must do so prior to filing a Statement of Defence or Demand for Notice. The Court may make any order it considers appropriate.

Practice tips

An Order for substitutional service is not required where a person appears in court. Where there is little urgency, it may be desirable to first serve the respondent in an alternative form of service, and then wait to see if they respond, failing which you can pursue a proper Order for substitutional service.

Instead of bringing a separate application for substitutional service, it is sometimes sufficient to serve a person using a traditional or alternative form of service, and then when the application is heard, apply for an order validating service pursuant to Rule 11.27, which is essentially asking forgiveness for irregular service and requesting that the Application proceed notwithstanding the irregular service. However, this relief must be set out in your Notice of Affidavit. Likewise, Rule 1.5 permits the curing of defects where there is no irreparable harm, the terms of the Order eliminate or ameliorate any reparable harm or prevent the recurrence of the defect, a suitable sanction is imposed (usually costs, but sometimes a penalty pursuant to Rule 10.49), it is in the interests of justice to cure the defect, and the party seeking relief has not taken further steps knowing of their prejudice.

Although an Affidavit is required, it need not necessarily be a separate Affidavit. If you are already filing a Notice of Application unrelated to substitutional service, and you suspect that service may be an issue, the same Affidavit can list the information required for substitutional service.

If a method of substitutional service is obvious and a matter is urgent, it is common for counsel to arrive at court with a form of Order ready to be signed. However, where there is not an obvious method, it may be wise to list multiple methods of service, or wait until the Court makes its

determination. In Edmonton and likely other jurisdictions, the Law Library on the second floor of the courthouse can be used to access your email or a USB key containing forms of orders, so that you may return to the same judge on the same day to obtain a signature and avoid delay. They also possess green paper, or you can pack green paper in your briefcase.

For methods of service where it is not possible to attach the Statement of Claim or Notice of Application, such as in a newspaper advertisement and some social media routes, the notice will typically direct a person to contact your law firm to obtain copies thereof, and will note any court date. For matters of guardianship, it may be appropriate to list any child's name and their birthday. The exact language should be set out in the Order itself. For example:

> "NOTICE OF ACTION. [#DEFENDANT'S NAME IN LARGE BOLDED FONT#]. [#DEFENDANT'S NAME#], please be advised that a legal action in the Court of Queen's Bench of Alberta for divorce has been commenced by your wife [#CLIENT'S NAME#]. You are named as the Defendant in this action numbered 4803 ######. A Notice to Disclose Application will be heard in Family Law Chambers at the Edmonton Courthouse on ######, 20## at 10:00 a.m. To obtain a copy of the Statement of Claim for Divorce, Notice of Mandatory Seminar, and Notice to Disclose Application, we ask that you immediately contact: [#SOLICITOR'S NAME, FIRM, ADDRESS, PHONE NUMBER#]."

Rule 11.28(4) permits the Order to state on which day service is effective, which will usually be expressed to be within a certain number of days of completing an action, provided that the action is completed by a certain date. It is typical for the Respondent to be granted longer than the typical period of time (ie longer than 20 days within Alberta) to respond. If arriving at the Court with a form of Order, it may be desirable to leave these dates blank, as judges often each have their own preferred deadlines.

If proposing to serve a person through their mailing address, some judges like to see mail occur by both ordinary and registered mail, as some persons will not retrieve registered mail. If requesting service by registered mail, it may be beneficial to advise the court that in service of non-commencement documents, Rule 11.22(2) would have deemed service to be effective within 7 days of when the registered mail was sent.

It may be possible to retrieve motor vehicle registration information through the "Release of Motor Vehicle Information to Serve Court Documents" procedure. More information can be found at http://www.servicealberta.gov.ab.ca/release-of-motor-vehicle-info.cfm

Other common forms of substitutional service include serving a person's parents, serving a person's employer, posting a notice upon the front door or other conspicuous place at a person's residence, service through the Maintenance Enforcement Program if the person is using the Program, service through a parole/probation office, advertising in a newspaper (ensure that the Order lists the frequency and duration of advertisement, as this can be expensive in large centers), service by email, or service through social media such as Facebook.

Substitutional service applications should be brought in Masters Chambers in centres where Masters Chambers is available.

SUMMARY JUDGMENT

Law

Due to Rule 12. 48, summary judgment is not available in proceedings under the *Divorce Act* (Canada), even if corollary relief has been severed, nor a proceeding under both the *Divorce Act* and *Matrimonial Property Act* (Alberta), nor a proceeding under the *Family Law Act* (Alberta). However, summary judgment is available in proceedings under the *Matrimonial Property Act*, including where *Divorce Act* proceedings have been separated pursuant to Rule 3.71 (not to be confused with severance).

Rule 7.3(1) permits the Court to grant summary judgment in relation to all or part of a claim, where there is no defence to a claim or part of it, there is no merit to a claim or part of it, or the only real issue is the amount to be awarded. Note that summary judgment in relation to part of a claim can narrow the issues. Where judgment is only granted for part of the claim, the balance may be referred to trial or for determination by a referee, depending on the circumstances.

Summary judgment is appropriate where it is proportionate to the nature of dispute and the interests involved, and a proportionate, more expeditious, and less expensive means to achieve a just result.[254] However, our Court of Appeal has resisted shortcuts. The mere size of a claim and complexity of the issues don't mean that summary judgment is disproportionate, although summary

[254] *Hryniak v Mauldin*, 2014 SCC 7 at paras 29 and 49.

judgment on part of the claim may be appropriate.[255] Summary judgment is not appropriate where legal issues are unsettled, complex, or intertwined with the facts.[256] However summary judgment may be appropriate where there is solely an issue of law.[257]

An application for summary judgment must be accompanied by an Affidavit swearing that one of the grounds in Rule 7.3(1) is met, or by other means of evidence. The Court cannot rely on the pleadings alone, although in can make inferences based on undisputed facts.[258]

Several principles apply:[259]

1. A party bringing a motion for summary judgment bears the legal onus of showing no genuine issue for trial;
2. There is no onus on the responding party to prove a genuine issue for trial;
3. If the applicant for summary judgment discharges his/her onus on the material filed, a respondent who does not resist the application through admissible evidence risks judgment against him/her. That is an evidentiary burden;
4. There is no obligation on the respondent to file material. He/she can accept the risk described above. If the applicant fails to discharge his/her legal onus, the application will fail;
5. More commonly a respondent will provide admissible evidence opposing the motion. In that event, the court will consider all the evidence to determine whether the applicant has shown that there is no genuine issue for trial.

Pursuant to Rule 13.18(3), where an application may dispose of all or part of a claim, the affidavit must be sworn on the basis of personal knowledge of the person so swearing, not based on information and belief.

[255] *Attila Dogan Construction and Installation Inv. v. AMEC Americas Ltd*., 2015 ABCA 406 at para 24.

[256] *Condominium Corporation No 0321365 v MCAP Financial Corporation*, 2012 ABCA 26 at para 5; *Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc*, 2012 ABCA 328 at para 6.

[257] *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 at para 16.

[258] *Canada (Attorney General) v Lameman*, [2008] 1 SCR 372, 2008 SCC 14.

[259] *Murphy Oil Co v Predator Corp*, 2004 ABQB 688 at para 17, affirmed 2006 ABCA 69 at paras 27-28.

Practice tips

Summary judgment can be used in matrimonial property actions where the divorce proceedings have been separated (not to be confused with severance), in unjust enrichment actions in relation to unmarried persons, and in relation to civil claims (eg defamation).

If there is another key witness, they should file an affidavit.

See "Joining/Consolidating or Separation of Claims and Parties" at page 65 of this Manual.

SUMMARY TRIALS

Law

A summary trial is a trial which is decided using affidavit evidence, although some *viva voce* evidence may be permissible with prior leave of the Court.

Parties do not need permission or the other party's consent to set a matter for a summary trial, as was required under the pre-2010 *Rules*. Rule 7.5 permits an application for a summary trial using Form 36, which must specify the issue or question to be determined, or that the claim as a whole is to be determined, include reasons why the matter is suitable for determination by way of summary trial, and be accompanied with an affidavit or any other evidence to be relied on. It must also specify a date for the hearing of the summary trial scheduled by the court clerk, which must be one month or longer after service of notice of the application on the respondent. No further evidence may be filed unless it would be admitted as rebuttal evidence at trial, or with the judge's permission.

Pursuant to Rule 7.6, where a respondent agrees to proceed by summary trial, they must file and serve their Affidavit in response or other evidence at least 10 days before the date the matter is to be heard.

Although consent is not required to file a summary trial application, the respondent may object by filing and serving notice of the objection and any other materials intended to be relied upon at least 5 days before the matter is to be heard. Such objection may be because the issue or question raised in the claim, or the claim generally, is not suitable for a summary trial, or a summary trial will not facilitate resolution of the claim or any part of it. The matter would then be heard by a judge to determine the suitability of a summary trial. However, the Court must dismiss the objection if, in the

judge's opinion, the issue or question raised in the claim, or the claim generally, is suitable for a summary trial, and the summary trial will facilitate the resolution of the claim or a part of it. In determining whether a summary trial is appropriate, the Court may consider:[260]

1. the amount involved;
2. the complexity of the matter;
3. its urgency;
4. any prejudice likely to arise by reason of delay;
5. the cost of taking the case forward to a conventional trial in relation to the amount involved;
6. the course of the proceedings;
7. whether all witnesses or only some were (will be) cross- examined in court;
8. whether there is a real possibility that the defendant can bolster its evidence by discovery of the plaintiff's documents and witnesses; and
9. whether the resolution will depend on findings of credibility.

Alternatively, there is nothing in the *Rules* that would prohibit an application to determine the suitability of a summary trial.

Rule 7.7(1) specifies that Part 5, Division 2, relating to experts and expert reports, applies, unless the parties otherwise agree or the judge orders otherwise.

Rule 7.7(2) permits Part 6 to apply, except as modified by the Division of the *Rules* pertaining to summary trials. Part 6 pertains to affidavits, questioning upon affidavits, evidence at application hearings (Rule 6.11: affidavits, expert affidavits, questioning transcripts, answers to written questions, affidavits of records, oral evidence with leave, evidence from other actions accompanied by at least 5 days notice or with leave of the Court, and anything else permitted by any other rule or enactment), preserving evidence, preservation or inspection orders, evidence outside of Alberta, restricted court access orders, notices to admit, and other procedures.

After the summary trial, Rule 7.9 permits the Court to dismiss the application, or grant the application and give judgment, either on an issue or generally. Judgment must be granted unless the application is dismissed, the evidence before the judge does not permit the court to find the facts necessary to decide the issues of fact or law, or the judge is of the opinion that it would be

[260] *Duff v Oshust*, 2005 ABQB 117 at para 24; *Bonsma v Tesco Corporation*, 2011 ABQB 620 at para 29.

unjust to decide the issues on the basis of the summary trial. Rule 7.11 permits the Court to, at any stage of a summary trial application, order the trial on the action generally or upon an issue, and may give further directions, or may give any procedural order that the circumstances require.

Rule 12.49 permit either party to apply, with notice, to adduce oral evidence during the summary trial.

As a summary trial is an application for a "final" order which may dispose of all or part of a claim, Rule 13.18(3) requires that affidavits be sworn on the basis of personal knowledge of the person so swearing, not based on information and belief. This means that counsel must be sensitive to issues of hearsay, and should have the third party swear an affidavit unless an exception to hearsay applies. See "Evidence and Hearsay" at page 44 of this Manual. In general, counsel should consider the admissibility of all exhibits and evidence.

Practice tips

Determining a matter based on affidavit evidence is generally much more efficient than using live witnesses and having experts attend to testify. Summary trials essentially bring the advantages of interlocutory applications for support and parenting to a final determination, which can be used to resolve the division of property, or where there are too many issues to resolve in Special Chambers.

The primary disadvantage of summary trials is that after performing all of the effort to arrive at a summary trial, the Court may be of the opinion that a full trial is necessary, particularly where there are issues of credibility. In that regard, leave can be sought to introduce *viva voce* evidence, usually on limited issues, to guard against the risk of having to proceed to trial. However, unlike in summary judgment, the Court in a summary trial may weigh and assess the evidence.

Furthermore, in summary trials it is not possible for compel the attendance of witnesses, or compel them to swear an affidavit. However, leave could be sought to have that witness testify, followed by a Notice to Attend as Witness at Trial.

The parties can choose to jointly prepare an Agreed Statement of Facts and/or Agreed Book of Exhibits.

The evidence should still be well organized, don't provide your judge with thousands of pages of exhibits.

The burden of proof remains the same as in an ordinary trial.

Summary trials are scheduled through the Trial Coordinator, but do not require the opposing side's consent. They appear on the trial list, however as they require fewer days than an ordinary trial, and earlier date may be possible (although not necessarily so, as sometimes longer trials happen to be available sooner). The $600 trial filing fee continues to apply.

Although the rules pertaining to experts apply, the expert's report may be attached to an Affidavit sworn by the expert, accompanied by sufficient information to qualify the expert, such as their *curriculum vitae*. This avoids having to hire an expert to prepare for trial and spend several hours testifying and waiting to testify.

Parties may filed an unlimited number of affidavits, and exhibits, which are not restricted by the page limits contained in Family Law Practice Note 2. The old restrictions contained in former Rules 158.1(3) and 158.5 are no longer present in the 2010 *Rules*. Family Law Practice Note 2 does not apply to the summary trial process.

For more information pertaining to summary trials, including a review of some of the jurisprudence that has emerged in British Columbia (where summary trials are much more prevalent), and a precedent Summary Trial Hearing Order being circulated in Lethbridge and Medicine Hat, see the LESA paper "Family Law Summary Trials in Alberta" by Michael Kraus Q.C. and Ally Ismail, Student-at-Law for presentation at the Family Law Trial Fundamentals seminar no November 17 and 22, 2016.

TAX DEDUCTIBILITY

Spousal/partner support

Periodic spousal or partner support payments are deductible by the payor, and taxable income for the payee.[261] This does not necessarily mean monthly, even quarterly payments might be acceptable. There must be some formula, the payments cannot be completely unpredictable. The payments must be pursuant to an order or agreement, although an agreement can make payments made within one year of the date of the agreement deductible/income if clearly specified.

[261] *Income Tax Act*, s 56.1(4).

The payor can reduce their employee deductions by filing Form 1213 E (16) "Request to Reduce Tax Deductions at Source", which can be found at http://www.cra-arc.gc.ca/E/pbg/tf/t1213/t1213-16e.pdf

Lump sum payments are not tax deductible, which is why lump sum calculations adjust for the differential tax rates of both parties.

However, an advance on an existing obligation in a court order can still be treated as periodic support, so long as it's clearly intended to be an acceleration or advance.

Lump sum payments made to catch up on arrears that were ordered are still taxable and deductible for the tax year paid, but not if simply in an agreement.[262] As this may result in a special tax calculation, the client should seek tax advice.

The recipient must have control over how the funds are spent. Payments which also benefit the payor in part, such as payments towards matrimonial debts, may not qualify as spousal support. See http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/f3/s1-f3-c3-eng.html#N107C2

The following will never qualify for a deduction:

a. Payments towards the payor's residence;
b. Payments to purchase tangible property other than property that is medical or educational in nature or necessary to maintain the residence in which the recipient resides;
c. Payments over 20% of the original principal loan amount incurred to purchase or improve a residence in which the recipient resides.[263]

Legal fees

A recipient of support can deduct the legal fees required to claim child or spousal support, to increase support, and to collect arrears. The deduction is still permissible even if the application is unsuccessful, abandoned, or agreed upon, so long as it was a bona fide, non-frivolous case with a

[262] *James v. R.*, 2013 TCC 164; *Craig James v. Her Majesty the Queen* Docket 2011 – 1748 (IT)G, appeal heard on May 6, 2013; Revenue Agency's Income Tax folio S1-F3-C3.

[263] http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/f3/s1-f3-c3-eng.html#N107C2

reasonable prospect of success.[264] It is generally accepted that legal fees to obtain child support are deductible.[265]

The CRA used to disallow the portion used to establish eligibility for spousal support or to seek an increase to support, however the CRA might have reversed that position, see http://www.cra-arc.gc.ca/E/pub/tp/itnews-24/itnews-24-e.pdf

THIRD PARTY TRANSFEREES (S 10 OF THE *MATRIMONIAL PROPERTY ACT*)

Law

Section 10 of the *Matrimonial Property Act* permits third parties to become parties to matrimonial property proceedings where property has been transferred to a person who is not a bona fide purchaser for value, or where a spouse has made a substantial gift of property. The transferring spouse must have done so with the intention of defeating a matrimonial property claim. The transferee or done must have accepted the transfer or gift when they knew or ought to have known that the transfer or gift was made with the intention of defeating a matrimonial property claim. The transfer or gift must have been made within one year of the date the matrimonial property proceedings were initiated.

If the above conditions are met, the court can do any one or more of the following:[266]

a) order the transferee or donee to pay or transfer all or part of the property to a spouse;
b) give judgment in favour of a spouse against the transferee or donee for a sum not exceeding the amount by which the share of that spouse under the matrimonial property order is reduced as a result of the transfer or gift;
c) consider the property transferred or the gift made to be part of the share of the spouse who transferred the property or made the gift, when the Court makes a matrimonial property order.

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[264] *Trignani v. The Queen*, 2010 TCC 209 at para 28.

[265] *Wakeman v. The* Queen, [1996] 3 CTC 2165; *McColl v. The Queen*, 2000 DTC 2148; *Sabour v. The Queen*, 2001 CanLII 839 (TCC), [2002] 1 CTC 2585 (in obiter at para. 9); *Rabb v. The Queen*, 2006 TCC 140, [2006] 3 CTC 2266.

[266] *Matrimonial Property Act*, s 10(2).

A mere allegation of a gift of matrimonial property without further evidence is sufficient to add the transferee to the matrimonial property proceedings.[267] However a long-standing habit of loaning to friends and family, some of which loans were not repaid, nor expected to be, may not result in sufficient intention to defeat a matrimonial property claim.[268] Section 10 does not apply to testamentary bequests.[269]

A third party can apply to the court to be removed, or the court can do so of its own motion.[270] Note that because of Rule 12.48, summary judgment may not be available, unless the divorce and corollary relief have been separated.[271]

Practice tips

These issues typically arise where a person has transferred property to a family member at below fair market value, has set up a trust, or has added new shareholders to a corporation.

This relief can be sought in conjunction with a claim as a fraudulent conveyance, fraudulent preference, through the *Fraudulent Preferences Act* if insolvent at the time of or as a result of the transfer, or through the *Statute of Elizabeth*, which only requires proof of an intention to move the property out of the reach of potential creditors.[272] Other actions must be pled and joined once a party becomes aware of them, otherwise the doctrine of collateral attack may prevent a party from seeking multiple routes.[273]

The case law and section 10(5) are clear that no application need be made to add a person as a party: they become a party automatically upon notice. The Statement of Claim does not even need to specifically plea section 10.[274] However, the jurisprudence does not clearly set out what form of

[267] *Morris v. Morris*, 2006 ABQB 915 at para 3.

[268] *Wright-Watts v. Watts*, 2005 ABQB 708 at para 63.

[269] *Vreim v. Vreim*, 2000 ABQB 291 at para 71.

[270] *Morris v. Morris*, 2006 ABQB 915 at paras 15, 20-21.

[271] *Primeau v. Ober*, 2003 ABQB 824.

[272] *Zacharuk v. Zacharuk*, 2004 ABQB 384 at paras 16-18; *Milavsky v Milavsky*, 2011 ABCA 231 at para 39; *Milavsky v. Milavsky*, 2015 ABQB 395 at para 55; for a precedent Statement of Claim see *Dinapoli v. Yeung*, 2002 ABQB 714 at para 2.

[273] *Fisher v. Fisher*, 2008 ABQB 170at para 80.

[274] *Zacharuk v. Zacharuk*, 2004 ABQB 384 at para 9.

notice is required. Some lawyers will simply serve a letter along with the original Statement of Claim, containing a notice paragraph using much of the language of section 10(4). Other more cautious counsel amend the pleadings to name the transferees as parties to the action, and set out within the statement of claim the particulars of the transfer, the property at issue, and other particulars set out in section 10(4). However, as an amendment after close of pleadings would require an application, and no application is said to be necessary, this step may not be necessary. Regardless, on all subsequent pleadings and court documents relating to the third party, there should be an additional row listing the "Respondent(s) by s. 10 Notice".

Given that section 10 deems third parties to be parties to the action, they may be questioned. Where there is a concern of undue influence or "giving up" a family member, and a reasonable apprehension of prejudice, it may be possible to compel separate Questionings of each party, along with a direction that no defendants shall have access to the transcript of the Questioning of the other until further order or agreement.[275]

If adding corporations as third parties, note that in the Court of Queen's Bench, a non-lawyer cannot represent a corporation.[276]

THIRD PARTY DOCUMENTS

Law

Rule 5.13 permits an application to obtain records in the possession of a person not a party to the action, where:

1. That person is in control of a record;
2. There is a reason to believe the record is relevant and material. The test to be applied is "possible relevance", and this procedure should not be used as a "fishing expedition" or to obtain discovery;[277] and
3. The person who has control of the record might be required to produce it at trial.

[275] *Hykawy v. Hykawy*, 2008 ABCA 324 at paras 4-9.

[276] *Park Avenue Flooring Inc v. EllisDon Construction Services Inc*., 2016 ABCA 211.

[277] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co* (1988), 57 Alta LR (2d) 182, 88 AR 107 at paras 7-8.

The Court must order reimbursement of the cost of production in an amount determined by the Court.

Practice tips

This provision is often used to obtain records from governmental entities (eg Child and Family Services), financial institutions (banks and credit card companies), new partners, corporations, third parties to whom property has been transferred or gifted (although it may be more beneficial to deem them parties using section 10 of the *Matrimonial Property Act*, as set out in the preceding chapter), parties to whom income is alleged to have been diverted, and to obtain the notes and other records of doctor's, psychologists, and counsellors.

The Affidavit should provide evidence as to the record's existence, although in some cases records can be assumed to exist, such as corporate documents and a financial institution's records (ie bank records).

It is sometimes possible to obtain the same information through the *Freedom of Information and Protection of Privacy Act* or similar legislation, however information about any person other than the requestor tends to be redacted, even if such person is their former spouse or child.

Sometimes a party will undertake at Questioning to request the document from a third party, and to provide any documents produced. However, this can be prone to fraud in some circumstances.

Alternatively, it may be possible to add the party as a party to the action, so that the usual remedies such as Affidavits of Records, Questioning, and undertakings in Questioning apply. See "Third Party Transferees (S 10 of the *Matrimonial Property Act*)" at page 118 of this Manual.

For non-governmental entities, it may also be desirable to request the document first, in case they will provide it voluntarily.

UNDUE HARDSHIP

Law

Undue hardship allows for a reduction in child support in rare circumstances, including the following non-exhaustive circumstances:

a. the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
b. the spouse has unusually high expenses in relation to exercising access to a child;
c. the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
d. the spouse has a legal duty to support a child, other than a child of the marriage, who is
    i. under the age of majority, or
    ii. the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; or
e. the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

It has been stated that "the burden of establishing a claim of undue hardship is a heavy one…the hardship must be more than awkward or inconvenient. It must be exceptional, excessive, or disproportionate in the circumstances".[278]

There must be actual evidence of the hardship, a bald assertion is insufficient.[279]

Arrears should generally only be reduced or eliminated where the court is satisfied on a balance of probabilities that the former spouse or judgment debtor can not then pay, and will not at any time in the future be able to pay the arrears.[280] A present inability to pay may instead justify a time limited suspension or setting of periodic instalments.[281]

[278] *Hanmore v Hanmore* 2000 ABCA 57 at para 17.

[279] *Goulding v Keck*, 2014 ABCA 138 at para 57.

[280] *Haisman v Haisman* (1994), 157 AR 47 (CA) at para 27.

[281] *Haisman v Haisman* (1994), 157 AR 47 (CA) at para 26.

Practice tips

Undue hardship is very difficult to establish.

If making a claim for excessive debt, consider calculating the monthly minimum debt payments in relation to after-tax income.

The above list is not an exhaustive list of factors, and there are many cases discussing various other relevant circumstances. However, such a discussion is beyond the scope of this paper, which is meant to be a quick reference guide, not an exhaustive discussion on all topics.

A Household Standards of Living Test must be computed. Although the writer can attest that this is possible to calculate using a spreadsheet application such as Excel, it is much more efficient and likely to be adopted by the court to use software such as ChildView to calculate this test. However, even when this test is met, courts retain the discretion to refuse a reduction.

Even when there is hardship, it may be mitigated through a payment plan.[282]

VARIATION

Law

Parenting

Variation requires a material change in circumstances (in the condition, means, needs, or other circumstances of the child since the last order).[283]

The passage of time can constitute a material chamber in circumstances.[284]

According to a recent decision out of British Columbia, acts of contempt may be sufficient.[285]

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[282] *Goulding v Keck*, 2014 ABCA 138 at para 58.

[283] *Divorce Act*, s 17(5); *Family Law Act,* s 34.

[284] *Bergen v.Bergen*, 2008 ABQB 237 at paras 41-47 [two years]; *Edwards v. Basaraba*, 2015 ABQB 594 at paras 94-95 [seven years].

[285] *Friedlander v. Claman*, 2015 CarswellBC 4072 (BCSC).

It is generally inappropriate to make substantial changes in parenting arrangements without the benefit of *viva voce* evidence, except in the case of urgency, and only where it is clearly in the child's best interests, for example where a psychological assessment is available.[286]

Child support

Variation requires a chance in circumstances since the last order.[287] In *Family Law Act* matters, variation is also expressly permitted where evidence of a substantial nature was not available at the previous hearing has become available.

The change can be in relation to either spouse or of any child.[288] If the change was known at the time, it cannot be relied on as the basis for variation.[289] Inflation over time and the age of the child may be sufficient.[290] Other examples include a disability or change in the health of a parent or child, receipt of an inheritance, a new partner who contributes to expenses, or the addition of a new dependant.[291]

If a parent's wealth increases, even significantly, that in itself will not necessarily entitle the child to increased support so as to permit them to live in luxury simply to emulate the lifestyle of their parent.[292]

Decisions outside of Alberta have held that where income is imputed, the onus is on the payor to show that either circumstances have changed such as it is no longer necessary or appropriate to impute, or if imputing is still appropriate a different amount is more appropriate given changed circumstances.[293]

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[286] *Shwaykowsky v Pattison*, 2015 ABCA 337; *Crawford v Crawford*, 2015 ABCA 376; *DB v RB*, 1996 ABCA 248; *HG v RG*, 2017 ABCA 89.

[287] *Divorce Act*, s 17(4); *Family Law Act*, s 77(4).

[288] *Willick v Willick*, [1994] 3 SCR 670 at para XXII.

[289] *Willick v Willick*, [1994] 3 SCR 670 at para XX.

[290] *Hickey v Hickey*, [1999] 2 SCR 518 at para 18.

[291] *Perron v Hlushko*, 2015 ABQB 595 at para 8; *Walker v Walker*, 2016 ABQB 181, [2016] AJ No 550 at paras 20, 27, 28 [new dependant].

[292] *Willick v Willick*, [1994] 3 SCR 670 at para XXV.

[293] *Trang v. Trang*, 29 R.F.L. (7th) 364 (Ont. S.C.J.); *Power v. Power*, 2015 NSSC 234.

Spousal support

Variation requires a change in the condition, means, needs, or other circumstances of either former spouse since the making of the previous order.[294] In *Family Law Act* matters, variation is also expressly permitted where evidence of a substantial nature was not available at the previous hearing has become available. These requirements remain the same whether support was pursuant to an order or agreement.[295]

Generally, material changes must have some continuity, not just temporary circumstances.[296] The sufficiency of the change must be examined in light of the overall financial situation of the parties.[297] Even if the change was objectively foreseeable, that does not mean that it was subjectively contemplated by the parties at the time of the original order.[298]

Inflation over time and decreasing purchasing power may be sufficient,[299] as may be the termination of child support,[300] and assuming primary care of the children and household.[301] A substantial increase in post-separation income may also be sufficient,[302] however there must be a sufficient causal connection or contribution between the marriage and the increased income.[303]

Spousal support terminates upon **death**, unless the order or agreement specifically states that support is binding on the debtor's estate. This can be accomplished through an enurement clause, unless there is a clear time limit.[304] However, an estate claim for family maintenance and support may be possible.

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[294] *Divorce Act*, s 17(4.1); *Family Law Act*, s 77(5).

[295] *LMP v LS*, 2011 SCC 64, [2011] 3 SCR 775.

[296] *LMP v LS*, 2011 SCC 64 at para 35.

[297] *Hickey v Hickey*, [1999] 2 SCR 518.

[298] *G(L) v B(G)*, [1995] 3 S.C.R. 370.

[299] *Hickey v Hickey*, [1999] 2 SCR 518 at para 26.

[300] *Goodkey v Goodkey*, 2015 ABCA 394 at paras 20-21.

[301] *Shukalkin v Shukalkina* 2012 ABCA 274.

[302] *Goodkey v Goodkey*, 2015 ABCA 394 at para 20.

[303] *Chalifoux v Chalifoux*, 2008 ABCA 70.

[304] *Lippolt v Lippolt Estate*, 2015 ABQB 118 at para 92.

Variation is possible upon **retirement**, retirement is not considered to be foreseeable unless it is explicitly contemplated in the order or agreement.[305] However, variation may not be granted where ability to pay is not compromised, where the payor maintains an ability to generate significant income.[306] Retirement assets must be used by both parties in a reasonable attempt to generate income.[307] An Ontario Court of Appeal decision has stated that courts should not look past a payor's decision to retire unless the purpose is to frustrate the support order, in which case income may be imputed.[308] Financial need may trump double-recovery against investment income.[309]

Overpayment should not be required where there is no reasonable possibility that the payee will ever have the resources to repay any overpayment.[310]

Practice tips

A formal application to vary isn't always required, a judge can clarify their own decision or deal with an overlooked issue at a subsequent appearance without requiring a formal application.[311]

It's improper to bring another claim to undermine an order that was already granted simply for the purpose of bypassing the variation/appeal process (known as a "collateral attack").[312]

The onus is on the party seeking a variation to establish the change.[313]

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[305] *Norrish v Norrish*, 2015 ABQB 370 at para 37.

[306] *Boston v Boston*, 17 RFL (5th) 4 (SCC), at 16, para 61; *McCulloch v McCulloch*, ABQB at para 84; *Swales v Swales*, 2010 ABQB 187 at para 15.

[307] *Boston v Boston*, 2001 SCC 43 at paras 56 and 58; *Norrish v. Norrish*, 2015 ABQB 370 at para 70.

[308] *Teeple v Teeple*, [1999] OJ No 3565 (CA).

[309] *Boston v Boston*, 2001 SCC 43 at para 65.

[310] *RH v MH*, 1994 ABCA 249.

[311] *Simpson v Rondeau*, 2015 ABCA 283 at para 6.

[312] *R v. Wilson*, [1983] 2 SCR 594 at page 599.

[313] *L.M.P. v L.S.*, 2011 SCC 64 at para 31.

VEXATIOUS LITIGANTS

Law

Vexatious litigants and proceedings are addressed primarily through sections 23 and 23.1 of the *Judicature Act* (Alberta).

Therein, vexatious proceedings include, *inter alia*:

a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
c) persistently bringing proceedings for improper purposes;
d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
f) persistently taking unsuccessful appeals from judicial decisions; or
g) persistently engaging in inappropriate courtroom behaviour.

Section 23.1 permits all Courts, including the Provincial Court, to order that without the permission of the Court, a person shall not institute a further proceeding or institute proceedings on behalf of any other person, or order that a proceeding instituted by the person may not be continued. Such order can either be upon application or of the Court's own motion, but must be with notice to the Minister of Justice and Solicitor General. The Court must also be satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, with reference to the non-exhaustive list above, although section 23.1(9) expressly confirms that this section dos not limit the authority of the Court to exercise any other power of dismissal or stay due to abuse of process or any other ground.

Section 23.1(4) permits the Court to also make such order applicable to any other individual or entity who in the opinion of the Court is associated with the person instituting vexatious proceedings. Such orders may not be made against members of the Law Society of Alberta or otherwise authorized by section 48 of the *Legal Profession Act* when acting as counsel for another person. Subject to an

appeal, such order granted by the Court of Appeal or Court of Queen's Bench may also be binding on each other court, although an order of the Provincial Court is only binding upon the Provincial Court.

The following factors can be taken into account:[314]

1. the entire history of a dispute, including activities both inside and outside court;
2. other litigation and court history is relevant;
3. a person is presumed to intend the natural consequences of their acts; and
4. features and traits of vexatious litigation, which include:
    a) collateral attacks on previous judicial decision-making, including attempts to circumvent the effects of court orders;
    b) hopeless proceedings that cannot be expected to provide the form or scale of relief sought, involve disproportionate remedies and/or cost claims, or that are incomprehensible;
    c) escalating proceedings, where grounds and issues re-appear in subsequent litigation, and/or new parties, subjects, and issues are added;
    d) proceedings with an improper purposes, such as to frustrate litigation, for an ulterior motive or to obtain a collateral advantage, or which are intended to extort a benefit, as revenge, harassment, or to cause harm;
    e) "busybody" lawsuits that relate to third parties;
    f) failure to abide by court orders;
    g) spurious appeals;
    h) inappropriate courtroom behaviour;
    i) unsubstantiated allegations of conspiracy, fraud, and misconduct, including allegations of bias, harassment, and offensive and defamatory allegations;
    j) scandalous or inflammatory language in pleadings or before the court;
    k) OPCA arguments; and
    l) attempts to use court processes to further criminal activity (*Re Boisjoli*, 2015 ABQB 629 at para 98-103).

The following types of litigation conduct may also identify vexatious litigants:[315]

a) persons who engage in persistent and futile litigation as a consequence of their having a specific psychiatric condition, "querulousness" (Paul E. Mullen and Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006), 24 Behavioral Sciences and the Law 333; Grant Lester, et al, "Unusually persistent complainants" (2004), 184 British Journal of Psychiatry 35, for

[314] *Chutskoff v Bonora*, 2014 ABQB 389 at paras 80-93, 590 AR 288, affirmed 2014 ABCA 444, 588 AR 303.

[315] *Kavanagh v. Kavanagh*, 2016 ABQB 107 at para 63.

example *McMeekin v Alberta* (Attorney General), 2012 ABQB 456, 543 AR 132; *McMeekin v Alberta* (Attorney General), 2012 ABQB 625, 543 AR 11);

b) individuals who are affected with mental health issues that leads them to engage in litigation because of their altered perceptions or delusions (for example *Re FJR (Dependent Adult)*, 2015 ABQB 112; *Koerner v Capital Health Authority*, 2011 ABQB 191, 506 AR 113, affirmed 2011 ABCA 289);

c) litigants who have become obsessed with a single issue that they perceive as a critical interest and on which they re-litigate aggressively, a situation that occurs with disturbing frequency in family law litigation scenarios;

d) persons who litigate on the basis of false but allegedly legal principles which are intended to subvert correct legal principles and procedures, generally known as "Organized Pseudolegal Commercial Argument" litigants (*Meads v Meads*, 2012 ABQB 571, 543 AR 215); and

e) people who out of malice attempt to harm others by conducting litigation without a valid basis or attempt to frustrate valid legal action and steps (for example *Lymer (Re)*, 2014 ABQB 696; *644036 Alberta Ltd v Morbank Financial Inc*, 2014 ABQB 681).

There is a difference between vexatious litigants and vexatious proceedings. It is overbroad to declare a person a vexatious litigant if they're only fixated on a narrow group, in which case the order should not apply to all proceedings initiated against that person, unless there is evidence of vexatious litigation against multiple groups.[316]

Practice tips

Various remedies may also be utilized:

a. Striking all or part of a claim or defence, amending or setting aside a claim or defence, entering judgment or an order, or staying an action/application pursuant to Rule 3.68 where there is abuse of process, the Court has no jurisdiction, or there is a frivolous, irrelevant, or improper claim, or one in which there is no reasonable claim or defence;

b. Summary judgment pursuant to Rule 7.3, however be cognizant of the reduced availability in family law matters due to Rule 12.48;

c. Restrictions on filing or continuing litigation pursuant to section 23.1 of the *Judicature Act*;

[316] *RO v DF*, 2016 ABCA 170 at paras 37-40.

d. Procedural orders pursuant to Rule 1.4; and

e. The common law authority of the superior courts to control their own processes.[317]

Once a party is declared to be a vexatious litigant or engaging in vexatious proceedings, the following types of clauses may be implemented into an order:[318]

> Any litigation or steps in litigation against the ############## and those associated with ######him########, including ########his######## family (immediate and extended) and ##########his######## employer shall require leave of the Court of Queen's Bench.
>
> The ########## is declared a vexatious litigant pursuant to Section 23.1 of the *Judicature Act*, RSA 2000, c J-2, and is hereafter prohibited from instituting and further proceedings, or instituting proceedings on behalf of any other person, or continuing any proceeding which she has already instituted without leave of the Court in which the proceeding is to be initiated or continued.
>
> This Order shall be binding upon the Provincial Court of Alberta, the Court of Queen's Bench of Alberta, and the Alberta Court of Appeal.

The first paragraph pertains to vexatious proceedings, and the second to vexatious litigants. The third paragraph applies to both scenarios.

Parallel proceedings in multiple provinces will not automatically result in a stay or dismissal, instead the appropriate forum must be determined.[319]

See also "Self-represented litigants" at page 101 of this Manual.

[317] *Peddle v Alberta Treasury Branches*, 2004 ABQB 608.

[318] Based on *RO v DF*, 2016 ABCA 170.

[319] Sears Canada Inc v C & S Interior Designs Ltd, 2011 ABQB 471.