CITATION: Hutter v. Hutter, 2024 ONSC 785
COURT FILE NO.: FC-22-00000399-0000
DATE: 2024/02/05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kristine Elizabeth Hutter, Applicant

AND:

Skylar Andrew Hutter (MacMinn), Respondent

BEFORE: The Honourable Justice D. Piccoli

COUNSEL: Simenpal Kainth, counsel for the Applicant
Skylar Andrew Hutter, self-represented Respondent

HEARD: January 10, 2024

ENDORSEMENT

[1] Both parties have motions before the court.

[2] The parties uploaded into CaseLines, and the court has read, the following documents for these motions:

(a) Application of the Applicant dated October 6, 2022;

(b) Form 35.1 and 35.1A Affidavit of the Applicant dated October 6, 2022;

(c) Financial Statement of the Applicant dated October 6, 2022;

(d) Answer of the Respondent dated November 3, 2022;

(e) Financial Statement of the Respondent dated November 15, 2022;

(f) Form 35.1 and 35.1A Affidavit of the Respondent dated November 15, 2022;

(g) Financial Statement of the Applicant dated January 5, 2023;

(h) Final Minutes of Settlement dated January 26, 2023;

(i) Draft Final approved order signed by the Respondent on January 26, 2023;

(j) Form 14B motion of the Applicant dated January 31, 2023;

(k) Final Order of Justice Tweedie dated March 13, 2023;

(l) Notices of Motion of the Respondent dated September 3, 2023, amended on October 7, 2023, and October 31, 2023;

(m) Affidavits of the Respondent dated September 1, 2023, October 31, 2023, November 7, 2023, November 10, 2023, November 20, 2023, December 1, 2023, and December 8, 2023;

(n) Form 35.1 and Form 35.1A Affidavit of the Respondent dated January 2, 2024;

(o) The Respondent also directed the court to read the Applicant's Affidavit dated September 28, 2023;

(p) Notice of Motion of the Applicant dated November 6, 2023;

(q) Affidavits of the Applicant dated November 2, 2023, and November 23, 2023;

(r) Endorsement of Justice Madsen dated October 4, 2023;

(s) Endorsement of Justice Breithaupt Smith dated October 27, 2023;

(t) My endorsement of December 20, 2023;

(u) Form 35.1 and 35.1A Affidavits of the Applicant dated January 9, 2024 ;

(v) Factum of the Applicant dated January 4, 2024, and of the Respondent dated January 5, 2024;

(w) Confirmation forms of the parties;

(x) Bill of Costs of the parties.

[3] In addition, the Applicant sought leave of the court to file the Affidavit of Dan Hutter (the maternal grandfather of the child) dated January 4, 2024, and the Affidavit of the Applicant's counsel's law clerk dated January 9, 2024. The Respondent consented and was given the opportunity to respond to the Affidavit of Dan Hutter, by viva voce evidence, during the proceeding. As such, the court considered these Affidavits and the oral evidence of the Respondent.

[4] Although the Respondent referred to an Affidavit dated September 18, 2023, in his confirmation form, that Affidavit could not be located by the court. The Respondent advised the court that he would not be relying on that affidavit for these motions.

Orders Being Sought

[5] The Respondent asks the court to set aside the Final Order of Justice Tweedie dated March 13, 2023 ("Final Order") pursuant to Rule 25(19)(a) of the *Family Law Rules,* O. Reg 114/99 ("*Family Law Rules*"). He asserts that the Final Order was obtained by Fraud. In his notice of motion dated October 7, 2023, he also asserts that the Applicant intentionally withheld financial disclosure and as such, there was significant financial misrepresentation. For the first time in his factum, and in oral argument during the motion, he argued that the Final Order should be set aside as it is unconscionable. He refers to s.56(4) of the *Family Law Act*, R.S.O. 1990, c. F. 3 ("*Family Law Act*") and Rule 59.06 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 (*"Rules of Civil Procedure*") for unconscionable acts. He also refers to s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) ("*Divorce Act*"). In argument, but not plead, he also asserts he did not have capacity to consent to the Final Order and/or that he was under duress, suffering from financial hardship and lured into the agreement by the Applicant's false statements, obstructionist behaviour and perjury.

[6] In addition, the Respondent seeks the appointment of a parenting coordinator (no person named) who can make decisions to parenting issues that arise, subject to the review of the court. He requests that the Applicant pay for 100% of the costs of the parenting coordinator. Finally, he seeks costs of his motions.

[7] If the court grants the relief sought by the Respondent, he wishes to pursue spousal support, an equalization payment, joint decision making, equal parenting time or more parenting time, and other orders related to parenting including travel provisions, mobility provisions and access to information which he states is in the child's best interests.

[8] It is noteworthy that this is not a Motion to Change. The Respondent has at times referred to his motions as Motions for Enforcement. However, at other times, his motions were framed as motions to set aside the Final Order on the basis of fraud and lack of financial disclosure, and more recently, on the basis that it is unconscionable, and he lacked capacity or was under duress.

[9] The Applicant asks the court to dismiss the Respondent's motions and order that he be prohibited from bringing any further motions pursuant to Rule 14(21) of the *Family Law Rules*; she seeks her costs as well. The Applicant objects to the Respondent raising the issue of

unconscionability at this late a stage without notice. Further, and by way of oral motion brought at the commencement of these motions, she sought an order either dispensing with the Respondent's consent to sign passport documents or an order requiring him to sign the documents, she relied on the law clerk affidavit. As it relates to this oral motion, it was dismissed by the court on January 19, 2024, as there was no proper motion before the court.

[10] For the reasons that follow, the court declines to grant an order setting aside the Final Order save as it relates to para. 14 (regarding equalization). As it relates to the proportionate sharing of section 7 expenses, as set out in para. 9 of the Final Order, that will be reviewed as required by the Final Order.

[11] The court also declines to order the parties to retain a parenting coordinator, but instead orders the parties to attend intake sessions with AXIS mediation.

[12] The court cannot consider the Respondent's argument as to setting aside all or part of the order on the basis of unconscionability as that relief was not sought and therefore, is not properly before the court. Section 56(4) of the *Family Law Act* applies to domestic contracts, not court orders.

[13] The court prohibits the Respondent from bringing any further motions in this proceeding and sets out directions as it relates to the Respondent's Motion to Change should he proceed with it.

[14] The court orders that para. 14 of the Final Order which states "There shall be no equalization payment made by one party to the other" be set aside.

Background and Findings of Fact

[15] The parties were married on December 16, 2016, and separated on January 21, 2022. They have one child, Rayla Patricia Hutter, born on June 5, 2021 ("the child").

[16] The Respondent is a U.S. Citizen**.**

[17] The parties differ as to the role each of them assumed as it relates to the child during the marriage. The court notes that at the date of separation the child was just over six months of age.

[18] It is unclear what job the Applicant had at the date of separation. By the time she commenced the within proceedings, she was employed at Atrium Works Canada and also had self-employment income. Her Financial Statement dated October 6, 2022, shows employment income of $48,642.32, and self-employment income of $24,000, for a total income of $72,640.32 per annum. Her Notice of Assessment filed with her Financial Statement shows a line 150 income in 2021 of $48,644; her 2020 Notice of Assessment shows a line 150 income of $18,827 and her 2019 Notice of Reassessment shows a line 150 income of $6,274.

[19] The Applicant's Financial Statement dated January 5, 2023 removes all reference to self employment income and notes her then current income as $5,834.00 per month or $70,008.00 per annum. Her 2022 Income Tax Return shows a line 150 income of $74,833.99 comprised of $60,406.85 employment income, $5,140 employment insurance benefits, $2,500 RRSP income and a net self-employment income of $6,823.14.

[20] At the time of separation, the Respondent was employed as an Escalations Manager at Rogers. Although it is not clear what his status was at the date of separation, it is clear that by the time he filed his Answer, he was in receipt of taxable long-term disability ("LTD") benefits in this sum of $28,764 per annum. His 2019 Notice of Reassessment shows a line 150 income of $40,939 and his 2020 Notice of Assessment shows a line 150 income of $40,252.

[21] In submissions, but not in evidence, the Respondent indicated that it is the stress surrounding this litigation, and not being able to see the child on a regular and consistent basis, that prevents him from returning to work. Despite this, he plans to return to work.

[22] It is undisputed that in January 2022, the Respondent made a further attempt to end his life. As a result, the London-Middlesex Children's Aid Society ("CAS" or "the Society") again became involved with the family.

[23] The parties attended mediation following their separation in March and April 2022. Apparently, a report was completed, but an agreement was not signed, as at the time the Application was commenced the parties were no longer in agreement as it related to child support and parenting time.

[24] At the time of the mediation, the Respondent maintains that he lacked capacity given his overdose in January 2022. In argument, but not in evidence, he stated he took over 300 pills and as such, he was not in a state of mind to be mediating. He has not provided any medical evidence of his state of mind: at the date of separation, during the mediation, during the time the minutes of settlement were being negotiated, or currently. Further, it was one year following the separation that the parties entered into Minutes of Settlement.

[25] It is undisputed that following his release from hospital, the Respondent did not return to the matrimonial home. He asserts that he was "evicted" from his home and forced to live in college style housing.

[26] The Applicant commenced the within proceeding by way of Application dated October 6, 2022, served on October 23, 2022. At the time of the Application, she was represented by different counsel. She sought primary residence, sole decision making, that the Respondent have supervised parenting time, child support and retroactive child support (including section 7 expenses), that the Respondent maintain the child on his health plan, that he maintain life insurance sufficient to secure his support obligations (and that she be the beneficiary of same in trust for the child) and costs.

[27] The Respondent served and filed an Answer dated March 3, 2022. He sought spousal support, decision making and parenting time with the child.

[28] Neither party sought an equalization of net family property ("NFP").

[29] On January 23, 2023, the parties attended before a Dispute Resolution Officer ("DRO") for a conference. The DRO report notes in part that the Respondent "was encouraged to consult with duty counsel upon receiving the draft agreement."

[30] On January 26, 2023, the Applicant's then counsel sent an email to the Respondent, as part of settlement discussions, which is reproduced below as filed by the Respondent:

B939

Subject: Revised Minutes of Settlement
From: "Gretchen Reitzel" <reitzel@mgdlawyers.ca>
To: "Skylar Hutter" <finnigan.hutter@gmail.com>
Cc: "Heather Masse" <heather@mgdlawyers.ca>
Date: Thu, January 26, 2023 EST 13:41:57 [GMT -0500]
Attachments: Minutes of Settlement - Hutter with revisions.docx (28.79 KB)

Hello Mr. Hutter:
I have now had a chance to review your emails from yesterday with my client.
With regards to the costs of CAPP. The total fee payable is $200.00. According to the CAPP website the fee Is automatically split unless the order specifies one party pays. As a compromise Ms. Hutter is willing to agree to share the fee with each of you paying $100.
With regards to the section 7 calculations. We used Ms. Hutter's 2021 income ($48,644.00) and your estimated 2022 income. I note, however, that there was an error since you earn $2,397 per month it should have been $28,764 not, $27,600.00. Further, your 2021 income was $40,939.00. Ms. Hutter's 2022 income will be in the range of $45,000.00. So if we used both of your estimated 2022 incomes the proportionate shares would be 39% and 61% and if we used both of your 2021 incomes the shares would be 45% for you and 55% for Ms. Hutter.
Please note that Ms. Hutter will not make $70,000.00 in 2023 as she recently was laid off and she already has made quite a few financial concessions in this offer by waiving child care back pay and child support arrears totaling over $4000.00. We also note these amounts were calculated using the income of $27,600 instead of your actual 2021 income of $40,939.
We are willing to keep the proportions the same as originally offered despite the above (36% and 64%).
We will also remove the reference to sobriety as a compromise but, it is expected that you will not be under the influence of drugs directly prior to or during your visits with Rayla.
Attached are the revised minutes for your review.
Sincerely,

Gretchen T. Reitzel
Associate

MGD-Logo-CMYK
30 Queen St. N.
Kitchener, Ontario N2H 2G8
Tel: 519-742-4297
Fax: 519-744-5526

[31] The Respondent asserts that he relied on this email in making the decision to waive spousal support. The court rejects this assertion. The email clearly states that they are discussing section 7 expenses. The Respondent has failed to produce the full email exchange, as it relates to the negotiations, so that the court can determine what negotiations took place as it relates to spousal support. Further, the evidence by way of sworn financial statements set out the Applicants income in a range that exceeded $70,000 per annum.

[32] On January 26, 2023, the parties entered into Minutes of Settlement, which was one year following the Respondent's hospitalization related to his overdose. It is the evidence of the Applicant that the Respondent was encouraged to obtain legal advice. The Respondent answers

that he did not do so. He maintains that he was not eligible for Legal Aid, and later, that he believed he had to attend in person at the courthouse to speak with Legal Aid.

[33] The Respondent maintains that he was forced to sign the Minutes of Settlement or risk not seeing his daughter. Despite the voluminous material filed by the Respondent, he has not produced any evidence of this assertion.

[34] On January 26, 2023, the Respondent signed a consent Final Order.

[35] On March 13, 2023, the matter was addressed by Justice Tweedie in chambers and with one exception, the Final Order was made.

[36] Prior to the Final Order, either the Applicant or her parents supervised the Respondent's parenting time in their home. The parenting time from August 2022 to May 2023 was at least once per week. Despite the Final Order stating that the parenting time was to be at Child and Parent Place ("CAPP"), the Applicant and her parents continued to facilitate the Respondent's parenting time in the summer of 2023.

[37] In June and July 2023, the Respondent did not have parenting time as he went on a "personal development trip undertaken with the objective of enhancing my capacity to provide for my daughter." No further information was provided about this trip.

[38] In August 2023, the Respondent was arrested. He maintains that he was arrested based on baseless claims made by the Applicant that he hacked into her computer and distilled her personal information. He maintains that the Applicant exploited his arrest "due to her false allegations, [and that] the Applicant used it as an opportunity to withhold Rayla, resulting in our painful separation that endured for 202 days." He goes on to assert that the child,

> exhibited a blank, distant stare, which can be indicative of dissociation, and showed reluctance to express tears, potentially suggesting a learned response to emotional suppression or emotional trauma. Rayla's emotional response, particularly her dissociation, is unusual for a child her age and raises significant concerns. The extended period of separation, which she is unlikely to ever understand why, underscores the necessity for a thorough evaluation of her emotional well-being. Her reaction clearly indicates the vital role I play in providing her with emotional support and stability, further emphasizing the importance of making essential changes to the parenting plan. These incidents of psychological abuse and

> manipulation, which may suggest narcissistic tendencies on the part of the Applicant, have had a profound impact on my mental health and my ability to maintain a relationship with my daughter. The impact on our daughter and the potential for the Applicant's abusive behaviour, as demonstrated in her actions towards me, are deeply concerning. Her willingness to disregard our daughter's well-being for personal gain is alarming. The court must consider these factors when evaluating the Applicant's capacity to parent, prioritizing Rayla's well-being.

[39] In August 2023, the Respondent was criminally charged and was prohibited from contacting the Applicant. Those charges were subsequently withdrawn, and the Respondent entered into a peace bond.

[40] After the arrest, the Respondent began making derogatory statements to the Applicant's parents claiming they were abusing the child. He also emailed her parents about the person the Applicant was dating, referring to him as an abuser of young children. As a result, the Applicant's parents were no longer willing to facilitate his parenting time at their home.

[41] Although the Respondent disputes that he has been derogatory towards the Applicant's parents, or her lawyer, she has produced text messages and social media posts that confirm he has been. For example, in one text to the Applicant's parents he states,

> …You two are willingly engaged in abusing my daughter. Abusing. My. Daughter. Think it through…I will not give up. I will spend every waking fucking second of every god damn fuck day to get my daughter back, and when I do she will know what horrible disgusting people you are. Catholic values my fucking ass. I don't want partial custody anymore. I'm coming for full custody.

[42] The Respondent asserts that as a result of his failure to understand the process, he did not register for CAPP until September 12, 2023. Once he registered, there was a delay as CAPP did not have room to accommodate the visits. The visits started in December 2023 and are bi-weekly, not weekly, as required by the Final Order. The reason for this is CAPP availability.

[43] Despite the Respondent's assertions that the Applicant has misrepresented to the court the CAS involvement with the family, based on the redacted records before the court, the court declines to make that finding. The CAS records before the court indicated the reason the file was closed is because the Applicant "caregiver protects child."

[44] Since the Final Order, the Respondent has brought at least four motions. There have been orders made on October 4, 2023 (Justice Madsen), October 27, 2023 (Justice Breithaupt Smith in chambers), December 20, 2023 (by me) and now this decision.

Should the Court Set Aside Para. 14 of the Final Order?

[45] Para. 14 of the Final Order states that "there shall be no equalization payment made by one party to the other."

[46] It is undisputed that neither party requested an equalization of NFP in his and her pleadings.

[47] It is undisputed that neither party served a 13.1 Financial Statement as required by Rule 13 (1.2) of the *Family Law Rules* if a property claim is made.

[48] The Respondent has provided some evidence that there was an asset that existed at the date of separation; namely, monies in a rent to own account. Although the Applicant's assertion that those monies were used between the date of separation and the date she sworn her October 2022 Financial Statement is plausible, it is not an answer.

[49] The Final Order should not have included references to an equalization payment as the court did not have the jurisdiction to make the order; as such, this is a mistake, see: Rule 25(19)(b) of the *Family Law Rules*.

[50] Despite this court's order setting aside para. 14, the court does not find that the Applicant committed a fraud. There is no evidence that she made any false statement about her assets and debts at the date of separation – in fact there is no evidence from the Applicant on that issue.

The Law as it Relates to Setting Aside an Order on the Basis of Fraud

[51] Justice Madsen in *Howard v. Howard* (Kitchener File 20-56237 July 14, 2023, unreported) set out the principles as it relates to fraud at paras. 21-22 as follows:

> [21] Rule 25(19)(a) permits a court to set aside an Order, on motion, where obtained by fraud.
>
> [22] The following principles are set out in the caselaw with respect to the application of that rule:

a. *The alleged fraud must be proven on a reasonable balance of probability. This has been stated to be a "high threshold." Allegations of fraud must be strictly plead and proven.*

b. *The more serious the alleged fraud, the more cogent the evidence required;*

c. *The fraud must go to the foundation of the case;*

d. *The evidence must be clear and convincing;*

e. *The fraud must not have been known at the time of trial by the party now seeking to rely on it;*

f. *The allegation must be made promptly;*

g. *A party alleging fraud must show that the other party: 1) made a false representation; 2) knowingly; or 3) without belief in its truth, or 4) recklessly, careless whether it be true or false; and 5) did so with wrongful intent.*

h. *A party misspeaking, without intent to mislead, is not fraud. Inconsistency in sworn statements does not automatically amount to fraud. Omissions and other factual disagreements do not automatically amount to fraud.*

i. *Is assessing an allegation of fraud, the totality of the evidence must be considered, not just separate pieces of evidence assessed in isolation.*

j. *The onus is on the person alleging the fraudulent statements.*

Anker v. Sattaur, [2007] O.J. NO. 5257 at 33, 115
Rosati v. Reggimenti, 2018 ONSC 2, at 32 - 35
Gupta v. Gupta 2019 ONSC 20 at 37 - 40
Hatuka v. Segal 2017 ONSC 5623 at 28
Russell v. Thompson, 2021 CarswellOnt 189 at 17-20
Telford v. White, 2021 ONSC 2264 at 27
Mohammed v. Mohammed 2018 ONCJ 530 at 48

[52] The case law is clear the test to be met for a finding of fraud is high. Here, the court does not find that there was any intentional conduct by the Applicant to withhold her true income information to gain an unfair advantage or induce a settlement.

[53] The Applicant stating that she did not have her Notice of Assessment in September 2023, despite providing it to the Respondent in August 2023, does not amount to fraud.

[54] The Applicant being reassessed by CRA does not amount to fraud.

[55] The Applicant claiming personal use of her home, or incorrectly citing her address as a home they have not lived in since 2018, does not amount to fraud.

[56] The e-mail sent by the Applicant's-counsel on January 26, 2023 does not amount to fraud.

[57] The failure to disclose assets and debts as of the date separation, when there was no claim for an equalization payment before the court, does not amount to fraud. It does show a lack of attention that resulted in a mistake.

[58] In order to save time and expense, while ensuring that the procedure is fair to all parties, the court allows the Respondent's claim for an equalization payment and his motion to change should he initiate it, to form part of one Application. That Application can include the request for the change(s) together with the related claim for equalization, see: Rule 2 (3) and 8(2.1) of the *Family Law Rules.*

The Law as it Relates to Non-Disclosure and Duress

(a) Non-Disclosure

[59] In *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 47–48, the Supreme Court said the following about financial disclosure in the negotiation of a domestic contract:

> … a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.

[60] In *Toscano v. Toscano*, 2015 ONSC 487, 57 R.F.L. (7th) 234, at para. 54, the court referred to Professor James G. McLeod's annotation to *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.):

> Professor James G. McLeod notes that the trial judge quite properly refused to give effect to non-disclosure in that case. It appears that Justice Clarke was applying traditional contract law. Prof. MacLeod states the following:

> …a mistake, misrepresentation, or actionable non-disclosure will have no effect on the validity of the contract unless it is material and operative. Unless the failure to disclose affected the innocent party's decision to enter the contract or significantly affected the consideration for the contract, and unless the innocent party really cared about the misrepresentation and it was part of her decision, the contract should not be invalidated: Cheshire and Fifoot, *Law of Contract*, 19th ed., pp. 253-56. On the facts, it is unlikely that the non-disclosure was material or was relied on by the wife. Thus, the non-disclosure did not amount to an "inducement" and the contract remained valid.

[61] A failure to disclose an asset does not necessarily render a domestic contract a nullity: see, *LeVan v. LeVan,* 2008 ONCA 388, 90 O.R. (3d) 1**.** The non-disclosure must relate to "significant" assets, see: *Currey v. Currey* (2002), 26 R.F.L. (5th) 28 (Ont. S.C.).

[62] The Respondent asserts that during the relationship, the Applicant managed the finances and that,

> the significance of my access to limited financial records was not understood during the initial proceedings and now plays a significant role in demonstrating the inaccuracies in financial disclosure as evidenced by the exhibits provided. I must stress that I was not the intended recipient of the records but included by way of carbon copy, was not responsible for family finances, and lacked the need to peruse the folders that had been shared with mortgage brokers by the Applicant.

[63] The Respondent, then as some evidence of the Applicant's "consistent pattern of manipulation, coercion and fraudulent conduct" presents:

(a) PayPal transactions for December 2021 highlighting the Applicant's income from Creative Social Media Services ("CSMS");

(b) An invoice dated September 30, 2020, indicating a $1,850.00 USD retainer payment to the Applicant through PayPal;

(c) A 2022 T1 document, prepared by the Applicant in July 2023, which is page one of the Applicant's 2022 tax returns summary indicating a line 150 income for the Applicant of $68,010.85;

(d) A letter dated January 27, 2022 confirming the Applicant's contract employment with CSMS, where she worked since 08/05/2019, which stated that at the date of the letter she was receiving $22,000 USD annually.

[64] The Respondent acknowledges that he had access to these partial files during the initial proceedings, but because of his confidence in the accuracy of presented information, and the trust inherent in the marital relationship, he had no reason to be suspicious. These documents do not prove a failure to disclose income. The income is set out in the tax returns. The Applicant's 2022line 150 income ($74,833.99) is very close to the income set out in her 2022 ($72,640.32) and 2023 ($70,008.00) Financial Statement.

[65] As it relates to the Respondent's submission that he relied on Applicant's counsel's email of January 26, 2023, in waiving spousal support, that is not borne out by the evidence. First, the Respondent (despite the voluminous material filed) did not file the string of emails, and second, it is clear that the emails, as they relate to the Applicant's income, was in reference to section 7 expenses. The sworn evidence before the court set out the Applicant's income. The Respondent's offer to file further material (i.e. the string of emails) was disingenuous; his status as a self-represented litigant does not afford him unlimited opportunities to adduce the evidence required. Further, in submissions, the Respondent notes that he did seek legal advice as it relates to these motions.

[66] This case is distinguishable from *Irons v. Irons* 2020 ONSC 1471. This matter did not proceed without notice, which is what the *Irons* decision was focused on. Despite that distinction, it remains correct that both parties have an obligation to make full and frank financial disclosure. In this case, the court finds that the Applicant has met that obligation; any discrepancy between her Financial Statement and line 150 income is *de minimis*. The Respondent's arguments about expenses are not arguments as they relate to disclosure but are instead arguments as to how the Respondent's income is to be calculated; these arguments may be relevant as they relate to the proportionate sharing of section 7 expenses. Other than statements made by the Respondent, there is no evidence before the court that the Applicant's 2021, 2022 or projected 2023 income is what resulted in him waiving support.

[67] As it relates to section 7 expenses, the Final Order was based on 2021 income and requires that the Applicant pay 64% and the Respondent 36% of the section 7 expenses. Although there is reference in the material to daycare expenses for the child, there was no evidence regarding whether the-Respondent has paid any section 7 expenses for the child since the Final Order. The

Final Order requires an exchange of income information. As such, the proportionate sharing of expenses can be adjusted to reflect the parties' incomes year over year.

(b) <u>Duress</u>

[68] The preamble in the Minutes of Settlement signed by the parties states:

> SUBJECT TO THE APPROVAL OF THIS HONOURABLE COURT, the parties herein, neither of whom is under a disability, or their respective representatives as the case may be, agree to settle this case on a final basis and hereby consent to a final order on the following terms and conditions. Any or all of the terms of these Minutes of Settlement may be included in a final Order of this Court. However, if any of the terms contained herein cannot, by reason of the Rules of the Court, by custom, or for any other reason, be incorporated into an Order, such terms shall survive the granting of any order and the parties agree that these Minutes of Settlement shall be, and shall continue as, a Domestic Contract within the meaning of Section 54 of the *Family Law Act, R.S.O. 1990, c. F3*, or its successor, and shall prevail over the same matters provided for in the Family Law Act, or its successor, and such terms shall be binding as an enforceable Separation Agreement between the parties from the date of execution herein. The part of these Minutes of Settlement which does not form part of the Order shall constitute and continue as a Separation Agreement.

[69] The Respondent asserts that the coercion he experienced during mediation "persisted beyond the settlement negotiations and Final Order, where I felt compelled to agree under duress, subjected to relentless threats, all while coping with the destabilizing effects of my housing crisis." He maintains, but tendered no evidence, that because of his income and lack of support, he moved four times. He now lives with Megan Firlotte, who he describes as "incredible." This is the first time he has been able to live in a home that does not have four other occupants.

[70] Duress is described in *Toscano*, at para. 72, as follows:

> Duress involves a coercion of the will of one party or directing pressure to one party so they have no realistic alternative but to submit to the party (see *Berdette v. Berdette* (1991), 1991 CanLII 7061 (ON CA), 81 D.L.R. (4th) 194 at para. 22 (Ont. C.A.)). Equity recognizes a wider concept of duress including coercion, intimidation or the application of illegitimate pressure.

[71] Further, "there can be no duress without evidence of an attempt by one party to dominate the will of the other at the time of the execution of the contract": see, *Ludmer v. Ludmer*, 2013 ONSC 784, 33 R.F.L. (7th) 331, at para. 53.

[72] To prove duress, the Respondent must show that he was compelled to enter into the Agreement out of fear of actual, or threatened, harm of some kind. There must be credible evidence demonstrating that he was subject to intimidation or illegitimate pressure to sign the Agreement: see, *Ludmer* at para. 53.

[73] In this case, based on the findings of fact made above, and the fact that the Respondent has not produced any medical or other evidence as to his state of mind (other than his own statements, which I find are overstated) when he signed the Minutes of Settlement, I find, on a balance of probabilities, that although the Respondent may have felt stresses associated with his situation, he was not under *duress* when he entered into the Agreement.

Prohibition From Bringing any Further Motions Without Leave of the Court and Rule 14(21) of the *Family Law Rules*.

[74] Rule 14(21) of the *Family Law Rules* provides as follows:

> If a party tries to delay the case or add to its costs or in any other way to abuse the court's process by making numerous motions without merit, the court may order the party not to make any other motions in the case without the court's permission.

[75] The Applicant asserts that the Respondent's motions were filed after he was charged criminally. She believes that it is his goal to ruin her financially and emotionally. She states that he has made multiple threats that he will continue to bring motions. She asserts he is using the litigation as a blunt instrument pointing to the fact that the Respondent has filed four motions in this proceeding alone. She further argues that her costs of defending these motions exceeds $12,000 and the Respondent will find it difficult to pay costs if ordered to do so.

[76] In a social media post, the Respondent posted among other things "Rayla deserves so much more than this, especially from the people who say they will protect her who are doing the exact opposite. The. Abuse. Will. End. I will ensure that, I do not care how long it takes. How many Court appearances it takes. I will stop it. I will get my baby back…"

[77] The court stated its concerns to the parties that no matter its decision, further litigation would ensue. The court is concerned that such continued litigation is not in the child's best interests.

[78] Given my decision, there is no need for either party to bring any further motions in this proceeding. Rule 14(21) of the *Family Law Rules* is not broad enough to prohibit a party from commencing subsequent applications: see, *Berendson v. Rubio*, 2022 ONSC 4488 at para. 42. As such, the court does not prohibit the Respondent from commencing his motion to change.

[79] The Respondent has already produced an unsigned Motion to Change as Exhibit C to his Affidavit of December 8, 2023. Although the court does not prohibit the Respondent from bringing his Motion to Change, and pursuing an equalization of NFP, parameters are being put in place to avoid needless litigation.

[80] Although the court understands that the Respondent is self-represented, he must comply with the *Family Law Rules*. He must also communicate civilly with the Applicant and her counsel. He must refrain from sending countless emails, and other electronic communication, and he must access the resources available to assist him in preparing and finalizing his documents. He must not include frivolous or vexations statements in his pleadings.

Parenting Provisions and Spousal Support Provisions of the Final Order and Direction as it Relates to Motion to Change

[81] The parenting provisions are found at paras. 1, 2, 3, 4 and 5 of the Final Order and state:

> 1. The Applicant, Kristine Hutter shall have sole decision-making responsibility for the child Rayla Patricia Hutter, born June 5, 2021. The primary residence of the child, Rayla Patricia Hutter, will be with the Applicant, Kristine Hutter.
>
> 2. The Respondent, Skylar Hutter shall have parenting time with the child, Rayla Patricia Hutter born June 5, 2021, as follows:
>
> (a) Supervised visits weekly for a period of two hours at Child and Parent Place. These visits shall take place on Saturday or Sunday for a period of two hours as soon as Child and Parent Place can accommodate the visits.

(b) The Respondent, Skylar Hutter and the Applicant, Kristine Hutter shall equally share any and all fees associated with the Respondent, Skylar Butter's supervised visits at Child and Parent Place.

3. The Respondent, Skylar Hutter's parenting time **shall be re-visited** with a view towards expansion after the Respondent, Skylar Hutter consistently attends visits with the child, Rayla Patricia Hutter born June 5, 2021, at Child and Parent Place for a period of three months.

4. The Applicant, Kristine Hutter shall have the opportunity to review the notes from Child and Parent Place as well as any proof that the Respondent can provide to the Applicant regarding his attendance at mental health treatment prior to the parties agreeing to a schedule of expanded parenting time.

5. The Applicant, Kristine Hutter and the Respondent, Skylar Hutter shall keep each other updated as to their current address and phone numbers and will advise each other within 7 days of any change.

(Emphasis added)

[82] It is the Applicant's position that this is not a Motion to Change and unless the court finds the order should be set aside, the order stands. She asserts that even if the Respondent commences a Motion to Change, he has not shown a material change in circumstances. Before she will consider an expansion of the Respondent's parenting time, she requires he attend consistently at CAPP for 3 months (i.e. until March 17, 2023), that he provides her with the CAPP notes, his medical records and a drug test.

[83] The Applicant asserts that she has the same issues now as when the parties entered into a consent order. She points to the numerous unfounded accusations made against her, and her parents, and the court materials, as indication that the Respondent continues to suffer from mental health challenges. As a result, she maintains that he remains unpredictable, which could be due to substance abuse, and that he does not have the child's best interests at heart.

[84] It is not for this court to decide in this decision whether the Respondent must show that there has been a material change in circumstances or whether the provision is a review provision. This will be addressed by the court if the Motion to Change is brought.

[85] As reiterated by the Court of Appeal in *Cuthbert v. Nolis* 2024 ONCA 21 at paras 11 to 13:

> [11] While a review term in a final parenting time order is relatively rare, it is well-established that courts have jurisdiction to impose them: M. (K.A.A.) v. M. (J.M.), 2005 NLCA 64, 259 D.L.R. (4th) 344, at paras. 25-36. Neither party is required to establish a material change in circumstances with respect to an issue on which the court has authorized a review: Sappier v. Francis, 2004 NBCA 70, 246 D.L.R. (4th) 482, at para. 9. Contrary to the appellant's submissions, s. 29 of the Children's Law Reform Act, R.S.O. 1990, c. C. 12 does not impose an absolute requirement that a material change be shown in every case where a party seeks to vary a final order. As the Ontario Superior Court held in Fournier v. Fournier, 2020 ONSC 606, at paras. 84-85, "there is a narrow exception to the requirement that a material change in circumstances be shown, where the court has authorized a 'review'", which must be "narrowly construed and rarely ordered". More recently, in Y.M.S. v. R.O.S., 2021 ONSC 6684, at para. 70, Doi J. held that a "review term under [a] parenting time provision in [a] Final Order creates a rare and narrow exception to the usual requirement that a material change in circumstances be shown to vary a parenting order".
>
> [12] Again, review terms in final parenting time orders are not the norm. As the Supreme Court has directed, "[i]nsofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change … on proof of a [material] change of circumstances": Leskun v. Leskun, 2006 SCC 25, 268 D.L.R. (4th) 577, at para. 39. Courts have recognized that it is generally in the best interests of children to provide them "with stability in their lives following family breakdown" by incorporating "some sense of finality into child-care arrangements": M. (K.A.A.), at para. 26. For this reason, review terms are seldom ordered and must be 1) justified by genuine and material uncertainty at the time the original order is made, and 2) tightly delimited with respect to the issue or issues that will be subject to review: Leskun, at paras. 37-39; Fisher v. Fisher, 2008 ONCA 11, 88 O.R. (3d) 241, at para. 65.
>
> [13] Provided these criteria are met, review terms allow a court to avoid "[locking] the parties and the children into an access arrangement" where "[t]he situation continues to unfold in real time" and where the trial judge is not in a position to finally determine the appropriate parenting arrangements: Children and Family Services v. G.S., 2011 ONSC 1732, 279 O.A.C. 296, at para. 92. Put differently, a court-ordered review "removes the need for an aggrieved parent to 'guesstimate' when things have reached the point that he or she must return the matter to court": M. (K.A.A.), at para. 26.

[86] As the court declines to set aside the Final Order, the parents are left in a position where if they do not resolve matters, further litigation will ensue. As such, the court is providing direction to the parties.

[87] The Respondent maintains that this legal action is initiated with the sole intention of securing fairness, equality and the best interests of the child. Although the court accepts that the Respondent believes he is acting in the child's best interests, it is concerning that he fails to appreciate how his own actions contribute to the escalation of these matters. For example:

(a) He uses the words "tax fraud," "perjury," "calculated deceit," "manipulations," "fraudulent actions," "criminal acts of perjury," "documented forgery," and tax evasion" to describe actions of the Applicant;

(b) He blames the Applicant for the police taking his phone when he was arrested in August 2023;

(c) He makes a baseless accusation that the Applicant may be concealing payments she fraudulently collected from Ontario works;

(d) Sending inappropriate emails to the Applicant's parents;

(e) Sending inappropriate emails and posts as it relates to the Applicant's lawyer and leaving him negative google reviews;

(f) Blaming his mental health problems on the Applicant, without any medical evidence to substantiate same;

(g) Accepting no responsibility for not seeing the child for 202 days, as he continued to submit, when 2 months of that was because he went on a personal journey;

(h) Blaming the Applicant for not having the fulsome parenting time set out in the Final Order but has not provided any other viable option for supervised parenting time.

[88] The Respondent posits that his mental health issues stem from the marriage; that he had no documented history, nor demonstrated any concerns about his mental health, prior. Instead, the decline occurred during the relationship. In his Form 35.1 of January 2, 2024, he states that he had three hospitalizations and two suicide attempts during the marriage.

[89] The Respondent maintains that "I have consistently and responsibly managed my mental health, experiencing significant improvement since our separation, resulting in substantial reduction in my medication regime under the guidance of my psychiatrist."

[90] He asserts that since separation his mental health has significantly improved, such that he is taking 1/3 of his medication on the advice of his psychiatrist and is engaged in DBT therapy in preparation for his return to work. The Respondent has provided no medical evidence to this court, or the Applicant, as it relates to his mental health. He must do so.

[91] He is incorrect when he states that if his mental health were such that he was required to have supervised parenting time, then his instability would invalidate the Final Order. Parameters around parenting in the best interests of a child do not equate to incapacity.

[92] In addition to not providing any medical evidence as it relates to his mental health history, he has not provided any of the notes from CAPP. Despite his argument that he had only had two visits, those notes may have been helpful.

[93] The Respondent did not offer to the court any other supervisor and the court will not require the Applicant, or her parents, to supervise his parenting time given the facts as they are known to the court.

[94] No one told the court what efforts had been made, if any, to find another supervised access centre.

[95] It is clear that when the parties separated, the Respondent also had issues with substance abuse.

[96] The Applicant asserts that on March 14, 2022, CAS became involved because the Respondent had left the child at daycare and according to the Applicant "went missing for 6 days on a cocaine and meth fueled bender."

[97] Instead of responding directly to this statement, the Respondent in his affidavit states:

> …the Applicant makes a baseless accusation that I am a drug addict, a claim entirely lacking in substantiation and relevance to the matter at hand. The Applicant has failed to provide any credible claim or evidence to suggest that I have ever attended my parenting time under the influence of any substance. These allegations are devoid of merit and hold no bearing on these proceedings or my supervised parenting time as explicitly stated within the final page of my Exhibit C.

[98] However, the final page of Exhibit C (which are selective and redacted CAS records) notes in part that,

> Skylar continues to struggle with substance use and has acknowledged that he is not able to care for [redacted] at this time…Though Skylar's struggle with mental health is verified, the family has a plan that Skylar will not be left in a caregiving role and no longer resides in the home…Though Skylar's struggle with mental heath is verified, he has adequate supports in place in the community…

[99] The Respondent maintains that the Applicant exploited his mental health issues by abruptly ending their relationship and then having him evicted from their home.

[100] The Respondent's 35.1A Affidavit dated November 15, 2022, refers to CAS involvement with the family; one relates to the parties seeking the child be removed from NICU in June 2021; one relates to the Respondent requesting the Applicant call an ambulance in November 2021 as he was suicidal; and one relates to January 2022 when "Skylar had a suicide attempt. Kristine found Skylar with a suicide note and called 911 and CAS was called again as Rayla was present." He indicates CAS thereafter closed their file.

[101] The Applicant in her 35.1A Affidavit of October 6, 2022, as it relates to the January 2022 incident, indicates "January 2022 - Skylar attempted suicide by taking all of his medications. Kristine found Skylar with a suicide note and called 911. Rayla was present so CAS was called. CAS closed their file on the condition that Skylar would not be in a primary caregiving role to Rayla."

[102] As such, before the Respondent initiates a motion to change the Final Order, he must:

(a) Produce to the Applicant the unredacted notes from CAPP;

(b) Provide medical evidence to the Applicant as to the status of his mental health including his diagnosis, if any, treatment plan, recommendations, prognosis and whether he is compliant with medical advice.

[103] Although the court does not make it a precondition of initiating a Motion to Change, the Respondent is strongly encouraged to provide evidence to the Applicant that he is no longer abusing drugs.

[104] Further, and as it relates to additional parenting time, the Respondent shall determine and advise the Applicant in writing whether there is a supervised access facility within a 40-kilometer range of the Applicant's address that can accommodate a further access visit as contemplated by the Final Order. If such a facility is available, the parties shall register at the facility sharing the costs equally in the first instance.

[105] As it relates to spousal support, para. 13 of the Minutes of Settlement and para. 13 of the Final Order states: "There shall be no spousal support payable by one party to the other."

[106] As the Ontario Court of Appeal held in *Tierney-Hynes v. Hynes* (2005) 75 O.R. (3d) 737 (ONCA)(leave to appeal to the Supreme Court of Canada dismissed) at para 76:

> [76] For these reasons, I conclude that a court now has jurisdiction to vary a dismissal of a support order. It follows from this conclusion that there is a genuine issue for trial in this case. It does not follow from this finding that the proverbial "floodgates" will open. Applications to vary previous dismissals of spousal support will still be required to meet the threshold tests necessary to establish a meritorious claim. In addition, the spectre of adverse cost consequences will continue to serve to discourage applications for relief that are without merit.

Should the Court Order a Parenting Coordinator?

[107] Neither party sought this relief in his or her originating documents. Even though the court make exercise its *parens patriae* jurisdiction to order a parenting coordinator, it declines to do so in this case: see, *Katz v. Katz*, 2010 ONSC 158, 1 R.F.L. (7th) 329.

[108] Even if the court were to order a parenting coordinator, it would not order that the Applicant pay 100% of the costs of retaining them. To do so would only encourage the party not paying to behave unreasonably.

[109] Justice Chappel in her recent decision of *S.V.G. V. V.G.*, 2023 ONSC 3206 at paras. 116-134 speaks to the appointment of parenting coordinators. She summarizes at para. 134 that:

> [134] While the court can include a term in a final parenting order requiring parties to participate in parenting coordination services to attempt to resolve future parenting disputes, the term should always be subject to the right of either party to bring a motion at the relevant time for an order that the requirement should not

> apply based on the prevailing circumstances at that time. The decision as to whether it is appropriate to order parties to participate in parenting coordination services before returning to court will turn on the unique facts and dynamics of every case at the time the order is made. It involves consideration of several critical factors including the level of conflict and quality of communications between the parties in the past and at the time of the order, the nature of their past interactions with professionals, whether there has been any family violence between the parties or towards other family members, whether there are any concerning power imbalances between the parties, and practical considerations such as whether the parties can afford the services. Changes in circumstances over time may render the use of parenting coordination services inappropriate or impractical for any number of reasons. Accordingly, the interests of justice dictate that the parties should be granted a quick and cost-efficient means of revisiting the requirement to participate in parenting coordination services as a precondition to accessing the court in the future, based on the circumstances at the relevant time.

[110] In this case, in addition to not seeking the relief in the pleadings, a parenting coordinator, at this time, is only likely to lead to more expense. The Final Order is clear as it relates to decision making. There has been no material change in circumstances to warrant a change on that issue. To submit the matter to a parenting coordinator, in these circumstances, is not in the child's best interest; it will not likely lead to a quick and cost-effective means of addressing the issues. Further, even if a parenting coordinator were ordered, it would be on the basis that the parties share the expenses: see, *Ahmad v. Khalid* 2016 ONSC 5595 at para. 14.

[111] However, the court does require the parties to each complete an intake session with AXIS Family Mediation. It is the hope of this court that following the competition of that session, the parties will be able to move into mediation. That said, the Respondent must produce the evidence contemplated in the Final Order and as set out below before either mediation commences, or before he brings a Motion to Change.

Orders Made

[112] 1. Para. 14 of the Final Order of Justice Tweedie dated March 23, 2023 is set aside.

2. The Respondent is prohibited from bringing any further motions in the within proceedings.

3. The parties are ordered to each attend an intake session with AXIS Family Mediation. They must contact AXIS Family Mediation

(info@axisfamilymediation.com / 519-749-8989) within 15 days of the date of this order to secure his and her attendance for the intake meeting.

4. Before the Respondent can bring a Motion to Change the Final Order he must:

   i. Produce to the Applicant the unredacted notes from CAPP;

   ii. Provide medical evidence to the Applicant as to the status of his mental health including his diagnosis, if any, treatment plan, recommendations, prognosis and whether he is compliant with medical advice. A letter from his family physician and or psychiatrist will suffice at this time, subject to the Applicant's right to request further information if appropriate.

5. The Respondent may make his claim for an equalization payment. If he chooses to do so, then the Application for an equalization payment can include the relief he is seeking in his Motion to Change and form part of one pleading.

6. The Respondent shall determine if there is a supervised access facility within a 40-kilometer range of the Applicant's address that can accommodate a further access visit as contemplated by the Final Order. If such a facility is available, the parties shall register at the facility sharing the costs equally in the first instance.

7. All other claims in the motions are dismissed.

[113] I encourage the parties to resolve the issue of costs. If they are unable to do so:

(a) The Applicant shall have until February 20, 2024 , to serve and file costs submissions;

(b) The Respondent shall have until March 5, 2024 to serve and file responding submissions

(c) The Applicant shall have until March 12, 2024 to serve and file brief reply submissions.

[114] Submissions are not to exceed 5 pages double spaced, not including the bill of costs and copies of offers to settle, which must also be provided. Each party must serve and file a bill of costs. Reply submissions shall not exceed 4 pages double spaced.

[115] If a party does not serve and file submissions respecting costs in accordance with these deadlines, there shall be no costs payable to that party, although costs may still be awarded against that party.

[116] Cost submissions shall be sent to Kitchener.SCJJA@ontario.ca If no submissions are received on the schedule provided, the parties shall be deemed to have resolved costs on consent.

D. Piccoli J.