

Endorsement  
Amended Answer  
16 NOV 2017

CITATION: Kiska v. Moore, 2017 ONSC 6872  
COURT FILE NO.: FC-15-2446-0  
DATE: 2017/11/16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Jonathan Kiska, Applicant  
-and-  
Deirdre Moore, Respondent  
**BEFORE:** Madam Justice D. Summers  
**COUNSEL:** Wade Smith, for the Applicant  
Respondent is self-represented  
**HEARD:** August 29, 2017

This Exhibit 'H' referred to in the  
Affidavit of Deirdre Moore,  
sworn before me at the City of Ottawa, this  
17 day of April, 2018.  
[Signature]  
A Commissioner for taking affidavits

**ENDORSEMENT**

[1] The Respondent, Deirdre Moore, brings this motion under rule 11(3) of the *Family Law Rules*, O. Reg. 114/99 (the "FLRs") for permission to amend her Answer and Claim dated January 14, 2016. The amendments she seeks are extensive. They include thirty new claims and one hundred and six factual changes.

[2] Ms. Moore seeks to add many new tort claims for damages including intentional infliction of mental suffering and emotional distress, attempted parental alienation, defamation, breach of fiduciary responsibility, libel, harassment, and mischief. She does not quantify her damage claims. Ms. Moore also seeks amendments to request disclosure, vesting orders, restraining orders and police enforcement. Other proposed claims are essentially a re-statement and elaboration of support and property claims already advanced in her original pleading.

**Background**

[3] Ms. Moore and the Applicant, Jonathan Kiska, began living together in 1997. They married on July 22, 2000 and separated in the fall of 2015. According to Ms. Moore, separation occurred on September 23, 2015. Mr. Kiska states separation occurred October 9, 2015. The

1/11

parties have two children: Sean Charles Kiska, born May 8, 2006; and Cate Stella Kiska, born November 30, 2007.

[4] This application was commenced by Mr. Kiska on November 9, 2015 just before Ms. Moore was scheduled to leave the Ottawa Hospital, Civic Campus, where she had been under voluntary observation for mental illness since October 11, 2015. He also served and filed material requesting leave to bring an urgent motion for custody but did not proceed. According to Ms. Moore's Answer, she has now been diagnosed with psychosis NOS (not otherwise specified).

[5] The difficulties for this family came to a head on October 9, 2015 when Mr. Kiska arrived home to discover that the children had been removed from the home along with their passports and other items. Ottawa Police Services were able to locate Ms. Moore, in Gatineau, and during the evening of October 11, 2015 she returned home with the children. She then drove herself to the Ottawa Hospital where she remained until November 12, 2015.

[6] Ms. Moore's mental illness first presented in February, 2013. Mr. Kiska's pleading describes her symptomatic behaviours and psychotic episodes, the diagnosis of bipolar affective disorder, the history of her multiple hospitalizations and non-compliance with the medications prescribed. The application addresses the impact of Ms. Moore's mental illness on the family.

[7] In April, 2016 the parties reconciled for a brief period and separated for the final time on November 27, 2016. They were able to conclude an Interim Parenting Agreement on December 13, 2016 with the help of an experienced mediator.

[8] In February, 2017, Ms. Moore gave notice that she would be representing herself. Since that time, she initiated two procedural motions seeking leave to amend her Answer. Both procedural motions were contested. In between, efforts were made to deal with her amended Answer on consent. A Settlement Conference was held on June 28, 2017 and adjourned to a further Settlement Conference on September 25, 2017.

[9] Ms. Moore's most recent procedural motion was heard on July 13, 2017, by Master Fortier. The court held that the relief sought was not the subject of a short procedural

motion and should only be determined after full argument. Master Fortier's order set out the timetable for this motion.

**Analysis**

[10] The analysis for the relief sought by Ms. Moore begins with rule 11(3) of the *FLRs*. The rule states that the Court *shall give permission* to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate. [Emphasis added]. The discretion to deny an amendment is limited by the rule to those situations where it is not possible to address the prejudice caused by the amendment by an adjournment or a costs order. See *Stefureak v. Chambers*, [2005] O.J. No. 1949 (Ont. S.C.J.).

[11] In addition to rule 11(3), the court must consider common law principles before allowing an amendment. In *Fleming v. Fleming*, 2001 CarswellOnt 974, (Ont. S.C.J.), Justice Mackinnon refers to the decision in *Viaman v. Yates* (1987), 60 O.R. (2) 696 (Ont. H.C.) and states that a "pleading amendment purporting to raise a new claim should not be allowed if it discloses no cause of action in law".

[12] Here, I find that Mr. Kiska will not be prejudiced in the manner contemplated in rule 11(3) by the amendments sought by Ms. Moore. The case has not been scheduled for trial. There is ample time for questioning and other pre-trial steps that may be appropriate or required without need of an adjournment or compensation at this stage of the proceeding. The more difficult question is whether the amendments sought by Ms. Moore are tenable at law.

[13] Ms. Moore's draft amended Answer alleges that it was Mr. Kiska's abusive behavior during the marriage that caused her mental illness. She further claims that Mr. Kiska provided her treating physicians with false and misleading information that contributed to her diagnosis of bipolar disorder in 2013. Ms. Moore claims that she was wrongly diagnosed. She seeks to hold Mr. Kiska responsible for the alleged misdiagnosis and the regime of prescription medications that followed without, she says, helping her.

[14] Ms. Moore filed two affidavits on this motion. The first was sworn July 18, 2017 and the second was sworn August 3, 2017. I have reviewed and considered both affidavits as well as

Ms. Moore's factum. In support of her request to amend her pleadings, Ms. Moore points specifically to her medical records as well as Ottawa Police and C.A.S records that were not available to her counsel when her Answer was prepared. She argues that her pleadings would have included the claims she now wishes to make had she had the benefit of that information.

[15] Mr. Kiska opposes the motion to amend. He states that since March 2017, he has received multiple versions of Ms. Moore's draft amended Answer and still he remains unclear on the exact amendments she seeks to advance. As an example, counsel for Mr. Kiska referred to Ms. Moore's Affidavit of July 18, 2017 and, in particular, Exhibit Q, which purports to be her draft amended pleading. He argues that this document is deficient in at least two respects. First, it only consists of pages 3 to 5 of the Form 10 Answer and second, of the fifteen new claims set out in that version, many are unknown in law.

[16] One such example is the amendment sought by Ms. Moore for an order directing Mr. Kiska to perform community services for The Ottawa Hospital and other taxpayer funded services, as deemed appropriate by the court. Another example is the proposed claim for an order requiring Mr. Kiska to purchase a paid-up insurance policy on their daughter, Cate Kiska's, right eye.

[17] Mr. Kiska's counsel also refers to the factum that Ms. Moore filed on this motion. In particular, the document in the factum that is marked as Exhibit B is yet another version of her draft amended Answer that she asks the court to consider. This draft is now a complete Form 10 Answer under the Family Law Rules but has been further revised to disclose a total of thirty new claims against Mr. Kiska. It is argued that this version also contains many untenable claims or, if tenable, they are not claims properly brought against Mr. Kiska. One such example is Ms. Moore's request for an order directing that the Ottawa Police Service remove from its database the words "bipolar disorder" as they appear in reference to her.

[18] Mr. Kiska argues that Ms. Moore's original Answer, as filed, already provides for much of the relief she seeks by way of amendment. For example, Ms. Moore asks to amend her pleading to include a claim for costs based on bad faith when her Answer already includes a claim for costs. Similarly, Ms. Moore seeks to add claims for compensatory and non-compensatory spousal support and for specific special and extraordinary expenses under s. 7

of the *Federal Child Support Guidelines*, S.O.R./97-175, as amended ("*Guidelines*") when the current pleading also covers this relief.

[19] Argument at the motion regarding Ms. Moore's request to add various damage claims focused primarily on her claim to include the tort of intentional infliction of mental suffering and emotional distress. Mr. Kiska takes the position that the claim not be allowed as it is not a claim that can be brought in family law. As authority for this proposition, he relies on the Supreme Court of Canada decision *Frame v. Smith* [1987] 2 S.C.R. 99 and Justice Nelson's decision in *Lo v. Lo*, 2009 CarswellOnt 2979, S.C.J. as a more recent example of the court denying an amendment to include such a claim in a family law case.

[20] I do not agree that *Frame v. Smith, supra*, forecloses a damage claim in family law for the tort of intentional infliction of mental suffering. In *Frame*, the court considered tort claims for breach of fiduciary duty, conspiracy and intentional infliction of mental suffering where the custodial parent denied access and the suffering parent chose to pursue damages in tort instead of enforcing the access order under the existing legislative scheme. It is, therefore, my view that *Frame* stands for the proposition that no cause of action exists for damages for intentional infliction of mental suffering against a parent who denies access to a child when the other parent has a statutory remedy. I do not interpret the decision as foreclosing the possibility of tort claims in other areas of family law where statutory remedies are not available.

[21] In her dissent in *Frame*, Justice Wilson wrote of the public policy reasons for not allowing the torts of conspiracy and intentional infliction of emotional harm in family law and of the importance of discouraging unnecessary and vexatious litigation, especially in custody and access matters. She was of the view that the tort of intentional infliction of mental suffering might be used as "an ideal weapon" by spouses who believe their emotional trauma to have been maliciously caused by the other spouse. She cautioned that it was not for the court to fashion such a weapon for spouses to visit harm on one another, especially in light of the detrimental effect on the children. Also of concern to Wilson J. was the potential for the tort to be extended into other areas of family law, if allowed on the facts in *Frame*. She was of the view though that a claim for breach of a fiduciary may be asserted in family law under certain circumstances.

[22] The majority in *Frame v. Smith* took a view different from Wilson J. on the tort of breach of fiduciary duty but agreed that she had “adequately disposed of the possibility of other existing torts *applying to the circumstances of this case.*” [Emphasis added]

[23] In *Lo*, supra, Justice Nelson refused an amendment to claim intentional infliction of mental distress saying that the majority in *Frame* had approved of Justice Wilson’s dissent regarding this tort claim in family matters. As noted above, it is my view that the majority statement limits approval of Wilson J.’s reasons to the particular circumstances that were under consideration in that case.

[24] In support of her position, Ms. Moore points to the decision of Harvison Young J. in *Danic v. MacLean*, 2009 CarswellOnt 3289 (Ont. S.C.J.) as authority that the tort of intentional infliction of mental suffering has been allowed in matrimonial cases. Justice Pazaratz’ decision in *Costantini v. Costantini*, 2013 ONSC 1626 is another example of the court allowing this tort in a family law proceeding. Ms. Moore also points to s. 21.9 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43 (“CJA”), that enables the court, with leave of the judge, to combine other matters in a Family Court proceeding that are otherwise within the judge’s jurisdiction.

[25] I find further guidance in *Reuters v. Childs*, 2016 ONSC 391 (Ont. S.C.J.) on the question of amending pleadings. In that case, the court noted that the test on a motion to amend is different than on a motion to strike and rejected the argument that the amendment to plead a conspiracy claim should not be allowed for reasons of insufficiency. The decision in *Brookfield Financial Real Estate Group Ltd. v. Azorim Canada (Adelaide Street) Inc.*, 2012 ONSC 3818 and the following passage from Morden and Perell, *The Law of Civil Procedure in Ontario*, 1<sup>st</sup> ed. (Toronto: LexisNexis, 2010), at pp. 359-361 was quoted:

On a motion to amend a pleading, the court does not examine the factual merits of the proposed amendments or the moving party’s motives for seeking the amendment, but it does examine whether as a matter of law, the amendment raises a tenable claim or defence and whether the proposed amendment has been properly pleaded in the sense of complying with the rules that govern pleadings, including sufficient particularity. Put somewhat differently, it makes little sense to grant an amendment that will immediately be challenged as legally unsound, and the court may inquire into the merits to ensure that the amendment is tenable in law and compliant with the rules of pleadings. The case law establishes that

proposed amendments are to be read generously with allowance for deficiencies in drafting [.]

[26] The amendments sought by Ms. Moore are as follows:

1. An order for the awarding of compensation for general, aggravated and punitive damages due to the intentional infliction of mental suffering and emotional distress.
2. An order that the Applicant pay costs due to Bad Faith exhibited throughout the proceedings.
3. An order for the awarding of compensation due to attempted parental alienation.
4. An order that the Applicant pay costs associated with psychotherapy for children to reduce the impact of attempted parental alienation on their psyche.
5. An order for the awarding of compensation due to the tort of defamation.
6. An order for the awarding of compensation due to the tort of breach of fiduciary responsibility.
7. An order for the awarding of compensation for general, aggravated and punitive damages due to the negligent infliction of mental suffering and emotional distress.
8. An order for pecuniary damages related to the criminal act of Defamatory Libel.
9. An order for pecuniary damages related to the criminal act of Criminal Harassment.
10. An order for pecuniary damages related to the criminal act of Mischief.
11. An order for compensatory spousal support under the Divorce Act.
12. An order for non-compensatory spousal support under the Divorce Act.
13. An order for retroactive spousal and child support under the Divorce Act.

14. An order for constructive trusts and/or vesting orders for cost recovery and/or damages awards.
15. An order that the Applicant pay full cost of these proceedings.
16. An order that the Ottawa Police Services remove the word "bipolar disorder" from their description of me in their databases.
17. An order that the Applicant not come within 500 metres of the Respondent's home or harass Respondent by way of phone, text, e-mail or any other form of communication.
25. An interim and permanent order that the children's special and extraordinary expenses be paid by the Applicant.
27. An interim and permanent order requiring the Applicant to purchase a paid-up policy of life insurance in an amount sufficient to secure his child and spousal support obligations and that he designate the Respondent as irrevocable beneficiary thereof in trust for the children;
28. An interim and permanent order requiring the Applicant to purchase a paid-up insurance policy on daughter Cate Kiska's right eye.
29. An order for the awarding of compensation for any and all costs relating to a forced sale of the Vanson Avenue property (and movement to a different dwelling) due a lack of meaningful support by the Applicant that has/will ultimately lead to the Respondent's inability to maintain the property's mortgage, taxes, insurance and/or the Respondent's living expenses.
30. An order for the reimbursement of any credit card or line of credit interest that the Respondent incurred due to a lack of meaningful support and access to home equity or business savings.
31. An order for the awarding of compensation for all costs arising from the Applicant's 2015 Emergency Custody Order including, but not limited to:
  - a. family counsel-related legal fees and



- b. real estate-related fees for the conversion of an investment property into a primary residence located in the children's school zone.
- 32. An order for the awarding of compensation for loss of AdvisorOnTrack Inc. retained earnings and increased personal taxation due to reassessment of expenses by Canada Revenue Agency.
- 35. An order for the:
  - a. conversion of the Applicant's registered investments into risk-free, registered investments and
  - b. subsequent freezing of afore-mentioned assets.
- 36. An order of the provision of all 2016 and 2017 invoices billed by Applicant for contracts that were initially awarded to the jointly-held company incorporated by the Respondent, AdvisorOnTrack Inc.
- 37. An order of the provision of all 2016 and 2017 expenses incurred by the Applicant for the purposes of earning revenue from contracts that were initially awarded to the jointly-held company incorporated by the Respondent, AdvisorOnTrack Inc.
- 38. An order that the Applicant be required to perform community services for The Ottawa Hospital and other taxpayer-funds services in an amount that the Court deems appropriate.
- 41. An order that this order be police enforceable.

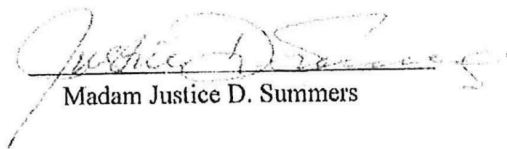
[27] For the reasons given, I allow the proposed amendment numbers 1, 3, 5, 6, 7, 8, 9, 10, 13, 14, 17, 25, 27 and 41. Read generously, the draft amendments contain claims recognized at law. The amendments sought at numbers 2, 4, 11, 12, 15, 29, 30, 31, 32, 36, and 37 are not allowed. They are redundant and are already covered by Ms. Moore's original pleading. The amendments sought at numbers 16, 28, 35, and 38 are untenable at law and are disallowed.

[28] The version of Ms. Moore's draft amended pleading under consideration in this motion includes one hundred and six proposed factual amendments. Some of the changes are deletions.

Others are new allegations and some go on for pages. The proposed Answer contains excessive detail and is rife with evidence. It reads more like an affidavit than a pleading that is to be a statement of essential material facts setting out the basis for relief sought at trial.

[29] Prolix pleadings offend the principle of proportionality. It should not fall to Mr. Kiska to deconstruct what is not properly constructed in the first instance to determine if there are subtle differences in repetitive paragraphs that may require a different response. See *Cadieux v. Cadieux*, 2016 ONSC 4446. The extensive amendments to the allegations of fact in the proposed form cannot be allowed and leave is denied.

[30] If the parties cannot resolve the issue of costs, Ms. Moore shall provide the court with her written submissions within 10 days. Mr. Kiska shall then have a further 10 days to respond with a 5 day right of reply to Ms. Moore. Submissions shall not exceed 2 pages in length exclusive of Offers to Settle and/or Bills of Costs.



Madam Justice D. Summers

**Date:** November 16, 2017

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Deirdre Moore, Respondent  
**BEFORE:** Madam Justice D. Summers  
**COUNSEL:** Wade Smith, for the Applicant  
Respondent is self-represented

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**ENDORSEMENT**

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Madam Justice D. Summers

Released: November 16, 2017

11/11