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— Franks & Zalev - This Week in Family Law

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Contents

Interpreting an Ugly Statutory Provision about Retroactive Variations of Child Support in Otherwise Beautiful British Columbia

Hinz v. Davey (2022), 73 R.F.L. (8th) 255 (B.C. C.A.) — Fitch, Butler and Marchand JJ.A.

Until the decision in *Hinz v. Davey*, it was not clear whether the B.C. *Family Law Act*, S.B.C. 2011, c. 25 (the "*Act*") allowed a court to retroactively vary child support payments set out in a separation agreement as opposed to the same provisions in an order. In *Hinz*, the Court of Appeal has clarified that courts in B.C. do have that jurisdiction.

In *Hinz*, the appellant (the "father") was appealing from an order dismissing his claim for a retroactive variation of an agreement between the parties with respect to child and spousal support.

The father lived in the land down under. The respondent (the "mother") lived in B.C. They had a 10-year-old child.

After the separation, the parties entered into a Separation Agreement. The Separation Agreement provided for tax-free monthly payments of $10,000 to cover *both* child and spousal support. The Agreement also required him to pay the private school tuition for the child. The father made the required payments until COVID-19 took a serious bite out of his business, whereupon the father applied for a retroactive variation of the support provisions of the Separation Agreement.

The issue was driven by the difference in wording in s. 148 of the *Act* — which *did not* specify jurisdiction to retroactively vary child support *agreements* — and s. 152 of the *Act* — which *did* specify jurisdiction to retroactively vary child support *orders*:

> **Agreements respecting child support**
>
> 148 (1) An agreement respecting child support is binding only if the agreement is made
>
> (a) after separation, or
>
> (b) when the parties are about to separate, for the purpose of being effective on separation.
>
> (2) A written agreement respecting child support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.

> (3) On application by a party, the court may **set aside or replace with an order made under this Division all or part of an agreement** respecting child support if the court would make a different order on consideration of the matters set out in section 150 [determining child support]. [**emphasis** added]

Changing, suspending or terminating orders respecting child support

> 152 (1) On application, a court may **change, suspend or terminate an order** respecting child support, and **may do so prospectively or retroactively**.
>
> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
>
> (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
>
> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made. [**emphasis** added]

Relying on this difference in wording and the cases of *M. (R.) v. M. (N.)*, 2014 CarswellBC 2773 (S.C.) and *Chutter v. Chutter*, 2016 CarswellBC 3658 (S.C.), the trial judge concluded that s. 148(3) of the *Act* did not permit a court to order a retroactive variation of child support:

> [29] Notwithstanding the unforeseeable change of circumstances that occurred in this case, I am bound by this court's previous interpretation of the relevant statutory provisions: *Hansard Spruce Mills (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.). I therefore find that the agreement cannot be varied retroactively and therefore do not need to deal with the question of effective notice.

For the Court of Appeal, however, Justice Butler found that the decision in *M. (R.)* was wrong on this point. Justice Butler was of the view that the *Act* permits retroactive variation of child support agreements as, by the wording of s. 148(3), a court may set aside or replace *all or part of an agreement with an order*. That is, a court can prospectively *or retroactively* change, suspend or terminate a child support order:

> [48] The starting point is to read s. 148(3) in its grammatical and ordinary sense. The provision does not permit modification of the words of an agreement, **but does permit a court to set aside or replace the contents of a child support agreement with an order** made under Division 2, the Child Support section of Part 7 of the FLA. Division 2 includes ss. 147-152. There is nothing in the plain wording of s. 148(3) to suggest that the court has no ability to set aside or replace the terms of a child support agreement with an order that has retroactive effect. Contrary to the finding in *R.M.*, and as noted in *T.L.A.*, **there is nothing in s. 148(3) to suggest that once a court determines that it should replace a provision of an agreement for child support with an order under the Act, it is nonetheless limited to doing so only prospectively**.
>
> . . .
>
> [53] The [mother] suggests that such an interpretation [to allow retroactive variation] does not align with the intention of the legislature to encourage parties to resolve their disputes through agreement, and that it compromises the parties' need for certainty and finality. However, as I will explain, the legislature has provided clear commentary on its intentions in regards to the objectives of child support agreements. In doing so, **it has expressed its intent that child support agreements be varied more easily than spousal support agreements** in order to reflect the greater need for flexibility in the context of child support . . .
>
> . . .

> [58] An interpretation of s. 148(3) that permits what is effectively the retroactive variation of an agreement for child support **aligns with the intention of the legislature that child support agreements be variable in the face of changing circumstances** for parent and child. While courts have found that agreements between parents "should be given considerable weight" (*D.B.S.* at para. 78), the legislature has made it clear that concerns around certainty and finality hold less weight in the context of child support agreements. [emphasis added]

Then, clarifying that the court does, in fact, have jurisdiction to retroactively vary a child support agreement, Justice Butler remitted the father's application back to the trial court.

This decision clearly makes sense, and we do not understand the reason for the different wordings in ss. 148(3) and 152. But on the assumption that no retroactive variation would mean no retroactive decrease *or increase* it only stands to reason that the Court of Appeal would find that retroactive variations are appropriate. If not, it would benefit rogue payors to hide their true incomes knowing that retroactive variation would never be possible where child support was set by an agreement as opposed to an order. There is no reason to treat an order differently from an agreement.

The practical interpretation of s. 148(3) offered by Justice Butler is surely welcome by all family law practitioners — and Courts — in Beautiful British Columbia.

I Suppose the SCOTUS Might Have Decided This One Differently . . .

M.W. v. B.J., 2022 CarswellNWT 41 (S.C.) — Smallwood C.J.

A Justice of the Peace granted an *ex parte* Emergency Protection Order ("EPO") against the (female) Respondent, B.J., on September 17, 2022, at the request of the (male) Applicant, M.W.

The parties were not married and the relationship ended when B.J. became pregnant. At the time the EPO was issued, B.J. was eight months pregnant.

The EPO was reviewed by a Supreme Court Justice as required by s. 5 of the *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24 (the "*Act*"). At the review, a question arose as to whether M.W. was in the category of person who could apply for an EPO pursuant to s. 2(1) of the *Act*.

Along with the parties, the Attorney General of the Northwest Territories was invited to make submissions on this point. The Attorney General was of the view that M.W. was not eligible to apply for an EPO because he was not (or at least not yet) the parent of a child with B.J.

Section 2 of the *Act* specifies who can apply for an EPO and clarifies that not all family or intimate relationships will qualify for protection under the *Act*.

Section 2(1) of the *Act* states:

> The following persons may apply for an emergency protection order or a protection order:
>
> (a) a spouse or former spouse of the respondent;
>
> (b) a person who resides with, or has resided with, the respondent in an intimate or family relationship;
>
> (c) a person who is, together with the respondent, a parent of a child;
>
> (d) a parent or grandparent of
>
> (i) the respondent, or

(ii) a person referred to in paragraph (a), (b) or (c).

The *Act* was meant to provide protection to specified individuals in specified intimate relationships but, by its wording, it was not intended to cover *all* people in all intimate relationships. As noted in *Lenz v. Sculptoreanu* (2016), 78 R.F.L. (7th) 29 (Alta. C.A.):

> [30] The *Protection Against Family Violence Act*'s extraordinary procedure was designed and intended to address one subset of abusive relationships — violence among prescribed family members — whereas common law restraining orders are available for broader forms of abusive relationships. The *Act* is a specially designed instrument that seriously abridges the liberty of person, and its application should be restricted to its intended familial context.
>
> [31] In summary, the *Protection Against Family Violence Act* has the specific purpose of targeting violence amongst persons with familial relations, as defined under the statute. The EPO scheme is reserved for those that fall within the strict definition of "family members".

An EPO is an extraordinary remedy, only available in certain situations of family violence and where there is sufficient urgency to have an EPO issued immediately and on an *ex parte* basis: *Siwiec v. Hlewka*, 2005 CarswellAlta 1290 (Q.B.) at para. 17.

Here, the parties were in an intimate relationship, but they were not spouses or former spouses. Nor did they live together. Nor had they *ever* lived together. So the "spousal" definition did not give M.W. standing to claim an EPO. But was M.W. "the parent of a child" within the meaning of s. 2(1)(c) of the *Act*? Remember, at the time, B.J. was eight months pregnant.

In s. 1 (1) of the *Act*, a "child" is a person under the age of 19 — and a "reasonable interpretation" of that phrase required a person to have been born because a person does not acquire an age until after birth: *Baby R., Re* (1988), 15 R.F.L. (3d) 225 (B.C. S.C.) at para. 17.

Her Honour looked to the definition of "person" in the *Interpretation Act*, S.N.W.T. 2017, c. 19, but it was of no help.

At criminal law, a "child" does not become a "human being" until it has been born alive as specified in the *Criminal Code*, and in *R. v. Sullivan*, 1991 CarswellBC 59 (S.C.C.), the Supreme Court of Canada held that "person" was synonymous with "human being." Therefore, a "child" does not become a "person" until it has been born alive. We can sense a good number of SCOTUS justices rolling in their chambers.

Outside the criminal context, in *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)* (1997), 31 R.F.L. (4th) 165 (S.C.C.), the Supreme Court of Canada stated as follows in considering the rights of an unborn child:

> [11] I turn to the general proposition that the law of Canada does not recognize the unborn child as a legal or juridical person. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. This is a general proposition, applicable to all aspects of the law, including the law of torts.

See also *Liebig v. Guelph General Hospital*, 2010 CarswellOnt 4012 (C.A.).

Justice Smallwood notes that there are simply differences in law as to how the unborn child and the born child are treated, and that the general proposition is that an unborn child is not a legal or juridical person.

Her Honour is also quick to note that her ruling is not a biological or spiritual conclusion, but just a legal one long recognized by the common law — perhaps in an effort to prevent any of the majority SCOTUS justices from caravanning up to Yellowknife.

Nothing in the *Act* suggested a different interpretation was meant. And, therefore, the *Act* did not permit the Applicant to apply for an EPO.

A Few Drafting Tips from the Ontario Divisional Court

Fracassi v. Fracassi (2022), 77 R.F.L. (8th) 428 (Ont. Div. Ct.) — Corbett, Lederer and Nishikawa JJ.

This was an appeal by the Appellant from a final order reducing the monthly spousal support payable by the Appellant to the Respondent from $2,650 a month to $1,815 a month and dismissing the Appellant's request to rescind his spousal support arrears. (Given the amounts in issue — periodic payments that total to not more than $50,000 in 12 months — the Divisional Court had jurisdiction over this appeal.)

This was a fairly run-of-the-mill support case (providing further jurisprudential support for the idea that, at some point people are actually allowed to retire), but in the short reasons, Justice Corbett takes the opportunity to offer a few suggestions to counsel when drafting separation agreements.

First, as a support decision, the standard of "considerable deference" from *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) applies:

> [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

Here, the parties in their Separation Agreement had specifically agreed that pension income would be included in the Appellant's income for support purposes, when determining post-retirement support.

The Appellant argued that the resulting support order would result in "double dipping", because the pension was equalized in the Separation Agreement. The application judge did not accept this argument. First, the Separation Agreement did not make it clear that the value of the pension was equalized — and, furthermore, no contrary inference could be drawn given the parties' agreement that pension income would be included to calculate post-retirement support obligations. The Respondent disputed that the pension was equalized.

This brings us to the **Drafting Tips**:

> [6] . . . A properly drawn separation agreement should not lead to a situation where a court deciding a subsequent change motion is required to conduct a forensic examination of the prior litigation in order to interpret the agreement.
>
> [7] **This court has been encouraging parties to deal expressly with what will happen upon retirement in cases such as the one at bar — where there is a long-term support obligation that will last at least until retirement.** Both sides need to understand what their position will be when retirement comes. Here, the parties did precisely what this court has been encouraging: they put their minds to what would happen at retirement and they agreed that pension income would be included to calculate support. We conclude that the application judge made no error in her interpretation and application of the separation agreement. [emphasis added]

These are helpful suggestions. Why not make it clear in the Separation Agreement exactly what will happen upon retirement? Is retirement an automatic material change? Is there an "acceptable" age of retirement? Was the pension equalized? Will future pension income be included as "income for support purposes"? And beyond the question of retirement, if there are assumptions or representations underlying the Separation Agreement — make them clear.

The application judge also refused to attribute employment income to the 70-year-old Respondent, finding that both parties were equally entitled to retire, given their ages and histories. What a reasonable finding with respect to a 70-year-old.

And while the Appellant argued that investment income should be imputed to the Respondent, the court below noted that the Respondent's potential investment income was dwarfed by the Appellant's potential investment income (given the disparity in their capital positions).

The *Spousal Support Advisory Guidelines* suggested a high-end range of $1,531 a month in support. The application judge found that she had the discretion to award an amount of support outside the *SSAG* ranges if the factors and objectives of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) so required after full analysis. And this is what was done.

The application judge awarded an amount slightly higher than the high end of the *SSAG* range in light of the unequal financial position of the parties, the intertwining of property and support issues in the Separation Agreement, and some shortfalls in disclosure on the part of the Appellant. There is no problem going outside the ranges if that decision is explained and justified: *Wild v. Wild* (2019), 24 R.F.L. (8th) 26 (Alta. C.A.); *Garritsen v. Garritsen* (2009), 71 R.F.L. (6th) 106 (B.C. S.C.); *Mason v. Mason* (2014), 47 R.F.L. (7th) 173 (Ont. S.C.J.), rev'd (2016), 83 R.F.L. (7th) 1 (Ont. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Angst v. Angst*, 2018 CarswellOnt 17152 (S.C.J.); *Domirti v. Domirti*, 2010 CarswellBC 2864 (C.A.).

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