

FAMLNWS 2023-03
Family Law Newsletters
January 23, 2023

— **Franks & Zalev - This Week in Family Law**

Aaron Franks & Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

- Oh, *THERE'S* a big surprise! I think I'm gonna have a heart attack and die from that surprise — Iago (the Parrot) from Aladdin
- At the Risk of Repeating Ourselves — This is No Way to Run a Railroad

Oh, *THERE'S* a big surprise! I think I'm gonna have a heart attack and die from that surprise — Iago (the Parrot) from Aladdin

Auer v. Auer, 2022 CarswellAlta 3388 (C.A.) — Crighton, Pentelechuk and Feehan, JJ.A.

It has already been determined that the *Federal Child Support Guidelines*, SOR/97-175 (the "*Guidelines*") are constitutional: *Premi v. Khodeir* (2009), 73 R.F.L. (6th) 334 (Ont. S.C.J.), aff'd, (2010), 5 R.F.L. (7th) 249 (Ont. C.A.), leave to appeal refused, 2011 CarswellOnt 1714 (S.C.C.).

But are they legal? This case has been the most determined attack on the *Guidelines* to date.

This appeal engaged two issues:

1. Were the *Guidelines* legally enacted by Parliament as a Regulation under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "*Divorce Act*") — that is, are the *Guidelines vires* Parliament; and
2. The correct approach when reviewing the *vires* of regulations made by the Governor in Council given the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.).

As family lawyers, we are mainly interested in the first question.

The Appellant, Mr. Auer, argued that the *Guidelines* are not actually authorized by s. 26.1(1) and (2) of the *Divorce Act*, which states:

Guidelines

26.1 (1) The Governor in Council may establish guidelines respecting orders for child support, including, but without limiting the generality of the foregoing, guidelines

- (a) respecting the way in which the amount of an order for child support is to be determined;
- (b) respecting the circumstances in which discretion may be exercised in the making of an order for child support;
- (c) authorizing a court to require that the amount payable under an order for child support be paid in periodic payments, in a lump sum or in a lump sum and periodic payments;

- (d) authorizing a court to require that the amount payable under an order for child support be paid or secured, or paid and secured, in the manner specified in the order;
- (e) respecting the circumstances that give rise to the making of a variation order in respect of a child support order;
- (f) respecting the determination of income for the purposes of the application of the guidelines;
- (g) authorizing a court to impute income for the purposes of the application of the guidelines; and
- (h) respecting the production of information relevant to an order for child support and providing for sanctions and other consequences when that information is not provided.

Principle

(2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

Specifically, the Appellant argued that (a) the amounts of child support are limited to what is reasonably needed for the maintenance of the children, and (b) the *Guidelines* must divide the amounts needed to maintain the children between the parents based on their relative abilities to contribute. He argues that the *Guidelines* as enacted effectively require the payor parent to pay a materially disproportionate share of child-related expenses.

The motion judge, Justice Rothwell, concluded that the *Guidelines* were validly enacted: *Auer v. Auer*, 2021 CarswellAlta 1166 (Q.B.). He found that the *Guidelines* were justified by the broad grant of power in s. 26.1 of the *Divorce Act*, and that none of the challenged aspects of the *Guidelines* were arbitrary, unreasonable, or illogical.

Of note, the decision below is an interesting read for the insight offered into the economics behind the *Guidelines* and for the detailed explanation of how the Table amounts were originally developed. As neatly summarized by Justice Pentelchuk for the Alberta Court of Appeal:

[88] Simply put, the Table amounts were based on economic studies of average spending on children and families at different income levels in Canada and methods for sharing those costs between parents. The models chosen to estimate child costs and the apportionment of those costs were the 40/30 Equivalence Scale and the Revised Fixed Percentage model, respectively. . . .

Of further note — this appeal was not the Appellant's first run at the *Guidelines*. It was just the latest instalment in his lengthy quest to have the *Guidelines* declared unlawful. Why was the Appellant so tenacious? It is probably because of a fact not readily apparent in the Court of Appeal reasons: he had been married three times; he had children from each of those marriages for whom child support was payable; and he was ordered to pay Table support for all his children. Table amounts remain presumptive even if the payor is responsible for children from different relationships: *ML v. RSE*, 2006 CarswellAlta 686 (C.A.); *Ewing v. Mallette* (2009), 64 R.F.L. (6th) 46 (Alta. C.A.).

The Appellant first applied for judicial review of the original decision in the Federal Court of Canada as one of several applicants. The Federal Court declined the judicial review application reasoning that provincial superior courts had greater expertise in family law. That decision was ultimately appealed to the Supreme Court of Canada, where leave was refused.

Undeterred, the Appellant then applied for judicial review in the Alberta Court of Queen's Bench, arguing that the *Guidelines* are not authorized by s. 26.1(2) of the *Divorce Act*. He was not successful.

Before the Court of Appeal, the Appellant made the following arguments:

[95] . . . First, the appellant argues that the Governor in Council was constrained by the principle outlined in s 26.1(2) of the *Divorce Act*: that spouses have a joint financial responsibility to contribute to the maintenance of their children in

accordance with their abilities. He interprets this to mean that the Table amounts can only be in respect of direct child costs and cannot generally redistribute income amongst families, even if that redistribution would benefit the child. Relying heavily on expert evidence, the appellant argues the presumptive Table amounts regularly require the payor parent to pay a disproportionate share of the actual costs of supporting the child, often more than 100%.

[96] The appellant argues that once the Governor in Council chose the 40/30 Equivalence Scale to estimate child costs, that model set the bounds of what could be transferred and any resultant transfer above that amount exceeds the Governor in Council's authority. He points to three aspects of the *Guidelines* that undermine the presumption that the recipient parent contributes proportionately to child-care costs: 1) not including the Canada Child Benefit in the recipient's *Guidelines* income; 2) failing to recognize that payor parents incur child expenses when exercising their parental time; and 3) allowing for additional payment of s 7 extraordinary expenses, which amounts to double counting.

[97] Relying primarily on the "Newfoundland illustration" cited by his expert, the appellant argues these "ignored benefits" not only demonstrate that a payor parent may pay more than their proportionate share of child costs but evidences an unreasonable outcome and "break in logic" that renders the *Guidelines* unlawful.

The problem with the Appellant's arguments and his attack on the *Guidelines* was that he was essentially attacking the policy choice of government. While the Appellant relied on expert evidence to "demonstrate" the illegality of the *Guidelines* and to show that Cabinet acted outside its authority, that evidence (along with rebuttal expert evidence in part from Professor Rollie Thompson) just showed that the Government made a policy choice. There were other models of child support Cabinet could have adopted, but this is what was chosen.

To succeed, the Appellant had to show that the *Guidelines* were inconsistent with the objective or purpose of their enabling statute — the *Divorce Act* — or that they were [para. 105] "irrelevant, extraneous, or completely unrelated to the statutory purpose of the *Divorce Act*." And that the Appellant could not do.

The empowering language of s. 26.1 of the *Divorce Act* (quoted above) offers a very broad grant of authority to the Governor in Council. And the s. 26.1(2) principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation is then reinforced through the objectives of the *Guidelines* in s. 1:

- a. to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- b. to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- c. to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- d. to ensure consistent treatment of spouses and children who are in similar circumstances.

As noted by the Alberta Court of Appeal, there is no definitive and perfect model of child support, and the lack of certainty and predictability of child support awards in the pre-*Guidelines* era was certainly no better. While there were other models of child support that were considered, this is the model that was selected, and s. 26.1(2) did not constrain that choice in any way.

While the *Guidelines* are certainly not perfect, the 25 years since their enactment has shown that they have achieved their stated purposes of predictability and easy application. And notably, where the *Guidelines* do have flaws, most of those flaws are arguably flaws in application at the margins rather than of enactment — such as s. 4 and high income payors.

But that is a discussion for a different time.

The *Guidelines* are legally enacted. At least no one had a heart attack.

Appeal is dismissed.

Given the tenacity shown by Mr. Auer in the past, this may not be the end . . .

At the Risk of Repeating Ourselves — This is No Way to Run a Railroad

M.Q v. R.C, 2022 CarswellOnt 3572 (S.C.J.), add'l reasons at, (2022), 74 R.F.L. (8th) 460 (Ont. S.C.J.) — McGee J.

How does this keep happening?

M.Q v. R.C is, tragically, a fairly typical high-conflict parenting case. It didn't involve any novel legal issues, but it took up far more than its fair share of our scarce judicial resources, and cost the parties (and the taxpayers) enormous amounts of time and money that could have been put to far better use.

The parties separated in 2014. Their son, L, was five years old at that point.

In 2018, after three years of high-conflict litigation, the parties consented to a final Order that was supposed to resolve the parenting issues once and for all. Uh . . . no.

As tends to happen in high-conflict parenting cases, armistice in the form of the final Order did not last long, and by 2019 the parties were engaged in another round of "knock-'em down; drag it out" litigation that culminated in a 22-day trial that included "detailed evidence of every solicitor's correspondence and litigation step taken in this proceeding since its inception." The mother's closing submissions alone took up 120 single-spaced pages.

At the conclusion of what sounds to have been an extremely frustrating trial, Justice McGee managed to write a thoughtful, sensible, and well-written decision explaining why she had decided it would be in the best interests of L, who was at that time 13 years old and in grade eight, to live with his father, and for his father to have sole decision-making authority. She also explained why she had decided to not put a specific schedule in place for L's time with his mother.

As the successful party, the father was entitled to his costs. According to his Bill of Costs, his costs (inclusive of disbursements) totalled **\$669,000** (rounded). The mother declined to file her own Bill of Costs, but acknowledged during the trial that she had spent *at least* **\$600,000** on her own legal fees. So between the two of them, they spent at least **\$1,269,000** on legal fees fighting about the parenting arrangements for their son. That is more money (certainly after tax) than most Canadians will earn in their entire lives, to say nothing of the costs incurred by the taxpayers to staff a courtroom for 22 days, and the opportunity costs associated with requiring a highly skilled family court judge to spend such a disproportionate amount of time hearing and deciding a single case, instead of helping the countless other family law cases that desperately need judicial intervention.

In the end, Justice McGee ordered the mother to pay the father **\$611,637** in costs. Although we aren't going to delve into the details, you can safely assume from the fact that Justice McGee awarded the father more than 90% of the costs he actually incurred that the mother was largely, if not entirely, responsible for the escalating costs of litigation.

We have no idea if the father will ever be able to collect any of these costs from the mother (although we suspect not as the decision indicates that although the mother is wealthy, she had taken steps to try to put her assets beyond the father's reach). We also have no idea whether the son will ever be able to have a healthy relationship with his mother (although we suspect not given the mother's behaviour that is described in the decision).

But we do know that if we don't find another way to deal with high-conflict cases, and stop letting high-conflict litigants monopolize a court system that is already facing enormous backlogs and delays, the system is simply going to collapse. Parties that cannot get along have no higher all on court resources than other parties.

In prior editions of *TWFL*, we've made a number of suggestions about how to deal with this problem. For example, in the 2021-44 (November 15, 2021) edition of *TWFL*, we wrote as follows:

We simply cannot keep giving family law litigants unlimited amounts of court time. Before a trial is scheduled, the parties must be given strict time limits, and they need to be held to them. If lawyers and parties know that they have a limited amount of time to present a case, that is what will happen. There is no absolute right to a trial on all issues or in all cases; there must be a reason to expend the personal and societal resources: *Merko v. Merko* (2008), 59 R.F.L. (6th) 439 (Ont. C.J.); *Rannelli v. Kamara*, 2011 CarswellOnt 14161 (C.J.)

However, since the problems seem to be getting worse by the day, perhaps the time has come for some more radical changes to the Rules. Here are just a few ideas to think about:

- A rebuttable presumption that every family law case will be scheduled for trial within 18 months of a proceeding being issued, and that no family law trial can take longer than five days except with leave of the court (we obviously realize that some cases will take longer, but those cases really can and should be the exception, not the rule).
- A means-tested user fee for litigants who take up more than their fair share of court time, with the proceeds to go towards a properly funded legal aid system to help ensure that more litigants who want help from a lawyer and are prepared to act reasonably can get one.
- Mandatory mediation with an accredited mediator in all family law cases except those involving domestic violence, together with a properly designed screening process to make sure that cases involving domestic violence are handled appropriately.
- Automatic prescribed financial penalties for litigants who do not provide basic financial disclosure on time. It is not complicated or difficult to obtain and produce basic financial documents like tax returns, bank statements, records of employment, etc., and the vast majority of litigants who claim otherwise are almost certainly lying.
- When court time is wasted, judges should be less hesitant to award costs, on an escalating basis, if the waste continues.