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

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Contents

I'm in Jail and I Don't Seem to Have My Chequebook

D.C.C. v. D.W.C., 2022 CarswellNB 645 (C.K.B.) — d'Entremont J.

D.C.C. considers whether and when a payor should be imputed with income while in prison.

The parties were married in 2013 and separated in 2019. The wife had two children from a previous relationship, and the husband adopted them in 2016.

During the marriage, the husband was a self-employed roofer. His income varied from year to year and was one of the issues in dispute. While there was at least some evidence to show that the husband earned $70,000 in the last full year of the marriage (2018), this was likely an aberration, as his tax returns in other years showed that he had typically reported taxable income in the range of $25,000 a year to the CRA (before accounting for the relatively small personal expenses that he was deducting as business expenses).

In September 2021, the husband was arrested and charged with harassing the wife. He was released on bail with a tracking device. He was arrested the very next day for breaching his bail conditions. He remained in custody until December 2021, when he was released on bail with an ankle bracelet.

In May 2022, the husband was arrested yet again — this time for breaching his bail conditions by entering the wife's home. As a result, his bail was revoked for the second time, and he was still in prison awaiting his criminal trial when the trial of the family law case started in November 2022.

The husband acknowledged he owed child support, but argued that he should not have to pay support while he was in prison (September to December 2021 and May 2022 to at least November 2022), as he had neither earned, nor been able to earn, income during those months.

Although the husband advised the court that he expected to be released in December 2022, he argued that he would not be able to get any work until the spring, and that he only expected to earn $20,000 a year, which would result in Table support of $308 a month.

The wife argued that the husband was intentionally underemployed, that he was capable of earning at least $50,000 a year as a roofer, and that he should be imputed with that level of income pursuant to s. 19(1)(a) of the *Child Support Guidelines*, SOR/97-175 (the "*Guidelines*") which permits a court to impute income to a spouse where:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

After reviewing the leading cases about imputing income under s. 19(1)(a) of the *Guidelines* including the Alberta Court of Appeal's recent decision in *Peters v. Atchooay*, 2022 CarswellAlta 3110 (C.A.) (see also our "welcome to the attribution of income club" discussion of *Peters* in the 2022-41 (November 7, 2022) edition of *TWFL*), Justice d'Entremont concluded that:

> 1. The husband was "intentionally under-employed and unemployed as he was imprisoned due to his reckless criminal conduct . . . as a result of harassing [the wife]."
>
> 2. His underemployment and unemployment was not the result of one of exceptions listed in s. 19(1)(a) (i.e. child care, health, or education).
>
> 3. Based on the husband's historic tax returns, including the personal expenses he had been deducting for his car, phone, and household, it would be reasonable to impute him with an income for support purposes of $36,000 a year.

But the far more interesting and difficult question that Justice d'Entremont had to grapple with was whether the husband should be imputed with income *while he was in jail*. The cases that have considered this issue show it to be a highly discretionary decision that depends on all of the particular facts of the case. For example, in *Lewis v. Willis*, 2022 CarswellOnt 13328 (C.J.), even though he was in prison, Justice Sherr nevertheless imputed a payor with income for the following reasons:

> a) The father was in jail due to his misconduct and violent behaviour towards the mother of one of his other children. The child should not bear the consequences of this conduct.
>
> b) The father's blameworthy conduct in this case has been significant.
>
> c) The father has neglected the child's special needs and the child's circumstances have been severely disadvantaged as a result.
>
> d) The duration of the father's imprisonment was not long (about 7 months). If this had been a longer term, the court might have made some adjustment to the imputation of income while he was imprisoned.
>
> e) The father led no evidence that his income earning capacity has been compromised by his imprisonment.
>
> f) The father earned Employment Insurance while he was in prison.

Some courts, however, have expressed reluctance to impute income to a payor who is unable to work because s/he is in jail. For example, in *Sheridan v. Cupido* (2018), 17 R.F.L. (8th) 475 (Ont. S.C.J.), Justice Minnema rejected the mother's submission that there should a "hard and fast rule that where a support payor is incarcerated child support is to be imputed based on prior earnings", and found "that imputation is discretionary under the *Guidelines* . . . and the ultimate consideration . . . is always reasonableness." Furthermore, as *Sheridan* involved a temporary motion, his Honour was concerned that he was not in a position to determine whether it would be reasonable to impute the payor with income while he was in prison on the record before him, and decided that the most appropriate way to deal with the situation would be to leave it to the trial judge to decide. As his Honour explained in his reasons:

> [15] While all the 19(1) listed criteria are clearly designed to direct the court in the exercise of its discretion in determining reasonable income, given the way it is applied subsection 19(1)(a) has the added practical role of encouraging or in effect coercing parents to earn to their capacity to support their children. However, **an incarcerated parent cannot modify his or her behaviour by finding suitable employment in response to an imputation order. The order proposed by the applicant here would simply create debt. As argued, there is also an underlying element of punishment or penalty for the alleged criminal behaviour.**

> [16] . . . In my view **it is preferable to have the trial judge, on better evidence and with more up-to-date information, assess what would be reasonable support going back to the date of the incarceration in the respondent's particular circumstances.** No order that I make will assist to get regular support flowing now. If the respondent is ultimately acquitted, there might be an issue about the intentionality of his unemployment. If the respondent is released relatively quickly, full imputation might indeed be found to be appropriate. However, while the court must be mindful of the children's need for financial support, if the respondent will be incarcerated for a long period, for example say 5 years, **the circumstances of all those involved will need to be practically and thoughtfully considered before he is saddled by way of imputation with a very large (in this example $76,000) debt upon his release, a debt that would be very difficult if not impossible to vary given that his circumstances while incarcerated are unlikely to change. . . .** [emphasis added]

As another example, in *S.M. v. N.T.*, 2018 CarswellOnt 17013 (S.C.J.), Justice MacEachern declined to impute a payor with income while he was in prison because, although the circumstances that resulted in his conviction were egregious, he had no savings, no income, no ability to earn income, and no ability to pay support. In these circumstances, exposing the payor to the risk of incarceration and enforcement actions for non-payment "does not serve the interests of justice, does not provide a fair and just result, and does not assist the best interests of [the child in the case]."

In the matter at hand, after considering the case law and the particular circumstances of the husband in this case, Justice d'Entremont decided ***not*** to impute him with income for the months he was in jail. While the husband was in prison as a result of his intentional misconduct, the reality was that he had no ability to work or earn income while in jail, and he had no material assets or savings. It was also unlikely that he would be able to earn very much once he was released given that he was already 55 years old, did not have a high school degree, and had a lengthy criminal record dating back to the 1990s. Accordingly, her Honour did not think it would be reasonable to require the husband to pay thousands of dollars in child support for the period he was in prison, that he had no ability to pay, based on an imputed income that he had no ability to earn.

However, Justice d'Entremont also rejected the husband's request for a support holiday from his anticipated release in January 2023 to the start of April 2023 so that he would have some time to try to get on his feet and find work. Instead, she ordered that his obligation to pay child support based on an imputed income of $36,000 a year would resume upon his anticipated release in January 2023.

Different people will have different views about what the "right" outcome is in these types of cases. On the one hand, the husband's conduct in this case was reprehensible, and it is difficult to see why the wife and children should have to suffer financially as a result of the husband's misconduct. But on the other, s. 1 of the *Guidelines* provides that child support is about providing "a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation", not about punishing payors for misconduct when they are already being punished. It is one thing to impute income when a payor loses his job because of voluntary or reckless misconduct — such as in the case of termination for cause. See for example: *N.D.S. v. J.A.S.* (2020), 50 R.F.L. (8th) 211 (B.C. S.C.); *Hutchison v. Gretzinger* (2007), 48 R.F.L. (6th) 167 (Ont. S.C.J.); *S.M.R. v. E.L.M.* (2019), 31 R.F.L. (8th) 442 (B.C. Prov. Ct.); *Brooks v. Brooks*, 2017 CarswellOnt 4061 (S.C.J.); *Luckey v. Luckey*, 1996 CarswellOnt 2237 (Gen. Div.); *Wright v. Lavoie* (2014), 53 R.F.L. (7th) 96 (Ont. S.C.J.). It is another to impute income to a payor that is in jail, and incapable of earning the imputed income. Income-based child support is not meant to be punitive: *M (T) v. K (Z)* (2021), 60 R.F.L. (8th) 57 (Alta. Q.B.).

At the end of the day, we think the best that can be said about incarceration/imputation cases is that there will almost never be a "right" answer. If five different judges were to hear the exact same incarceration/imputation case, we would not be at all surprised if they were to come up with five different conclusions. And, as these cases are highly discretionary and each turn on their particular facts, all five of them would probably be "right."

Can an Arbitrator Issue an *Ex Parte* Interim Preservation Order? Sometimes, but . . .

Nugent v. Nugent, 2022 CarswellOnt 19748 (S.C.J.) — Madsen J.

This was the wife's motion for a restraining/preservation Order brought on an *ex parte* basis. The interesting twist is that the parties were in an arbitration process. Can an arbitrator issue a restraining/preservation Order? And if so, could the Court still intervene despite the parties having bound themselves to the arbitral process? Let's see.

In August of 2022, the parties agreed to submit their matter to Mediation-Arbitration and a Mediation-Arbitration Agreement was signed. Under that Agreement, all issues in the proceeding were to be mediated, and if necessary, arbitrated. The Mediation-Arbitration Agreement was entered into under the *Family Law Act*, R.S.O. 1990 c. F. 3 and the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Arbitration Act*"). The *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*") were also stated to apply — *remember this*; this is important.

The wife swore that the husband had withdrawn $1.25 million from an account the parties had agreed would not be used without her consent. It was alleged that funds had already been removed and that the transactions had not been reflected in the husband's updated Financial Statement.

Recall that, generally, the *Arbitration Act* entrenches the primacy of arbitration proceedings over judicial proceedings. Subject to limited exceptions, courts will not intervene in an arbitration proceeding: *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Gen. Div.); *Bouchan v. Slipacoff*, 2009 CarswellOnt 155 (S.C.J.); *Grosman v. Cookson* (2012), 25 R.F.L. (7th) 284 (Ont. C.A.); *Hopkins v. Ventura Custom Homes Ltd.*, 2013 CarswellMan 355 (C.A.); *Haas v. Gunasekaram*, 2016 CarswellOnt 16116 (C.A.).

This results from sections 6 and 7 of the *Arbitration Act*:

> **Court intervention limited**
>
> 6. **No court shall intervene** in matters governed by this Act, except for the following purposes, in accordance with this *Act*:
>
> 1. **To assist the conducting of arbitrations**.
>
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
>
> 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
>
> 4. To enforce awards. [**emphasis** added]
>
> **Stay**
>
> 7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced **shall, on the motion of another party to the arbitration agreement, stay the proceeding.** [**emphasis** added]

In addition to s. 6(1) that specifically allows a court to intervene "to assist in the conducting of arbitrations," s. 8 of the *Arbitration Act* specifically vests continued power in the Court to intervene with respect to the preservation of property:

> **Powers of court**
>
> 8 (1) The court's powers with respect to the detention, **preservation** and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions. [**emphasis** added]

Justice Madsen first considered whether the motion before her should have been brought before the arbitrator given the primacy of arbitration proceedings.

There was little doubt that the arbitrator would have had the jurisdiction to issue an award restraining the disposition of property and preserving property on an *ex parte* basis. This was because the Arbitration Agreement specifically incorporated the *Family*

Law Rules. This is an important point — if you want an arbitrator to have similar powers to a court, it is crucial that the Arbitration Agreement specify that the *Family Law Rules* (or your provincial Rules of Court) apply. Absent this incorporation by reference, it is questionable whether an arbitrator can issue an *ex parte* award.

Justice Madsen then noted that even though the arbitrator could have issued the award in question, it would not have been particularly helpful for the arbitrator to do so. It is far from certain that a third party — such as a bank — would act on an arbitral award as opposed to a Court order. Therefore, after securing an *ex parte* preservation award, the wife would then have had to attend court (given the urgency) to have that award converted into an Order — and the passage of time would possibly enable further dissipation if that was, in fact, happening.

Here, two things made it quite clear that Justice Madsen had the jurisdiction to deal with the motion:

> 1. (As noted above) s. 6(1) of the *Arbitration Act* specifically allows courts to intervene in an arbitration to assist in the conduct of the arbitration.
>
> 2. (As noted above) s. 8 of the *Arbitration Act* specifically preserves the court's discretion to deal with the preservation of property pending an arbitration.
>
> 3. The Arbitration Agreement specifically provided that the *Family Law Rules* applied to the arbitration. Therefore, there was little doubt that the arbitrator could issue a restraining award and an award with respect to the preservation of property.

In aid of the arbitration, Justice Madsen issued the requested interim restraining and preservation order and set the matter to return to court given the *ex parte* nature of the motion and order.

Manners Maketh Man (and Sometimes Costs)

W.N. v. M.V., 2023 CarswellOnt 3092 (S.C.J.) — Conlan J.

This costs decision was with respect to one party (Ms V.) trying to force the sale of the jointly-owned matrimonial home. The hearing was heard by Zoom.

Ms V. was successful on the motion. Ms V. asked for $10,000 in costs. Ms V. was awarded only $1,000 in costs. Why? Let's see . . .

> [4] With regard to clause 8 of that draft order, costs, the amount of $10,000.00 was suggested by counsel for Ms. V. Mr. N. suggested no costs. Successful on the motion, there should be some costs in favour of Ms. V. **Her behaviour at court during the hearing, however, disentitles her to anything more than a fairly nominal sum. She cannot control her outbursts, gestures, eye-rolling, and so on, and there has to be some meaningful consequence for that. Mr. N., self-represented, did not replicate the bad manners. The meaningful consequence comes in the way of a much lower quantum of costs than what would otherwise prevail . . .** For as long as video courtrooms are here to stay, litigants and their counsel will be held to the same standards of professionalism that would otherwise apply in a traditional courtroom. Nothing less than that will be acceptable. [**emphasis** added]

Those are some expensive eye-rolls. Perhaps it might be a good idea to remind clients that courtroom decorum matters even when not in the actual courtroom.