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— Franks & Zalev - This Week in Family Law

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Ask Not Whether *Res Judicata* Applies to Child Support; Ask Whether Child Support Applies to *Res Judicata*

Sutherland v. Sutherland (2023), 86 R.F.L. (8th) 74 (Alta. C.A.) — Watson, Slatter, Kirker JJ.A.

This appeal raises the interesting issue of the extent to which a child support order can create an issue estoppel. Here, the specific issue was whether an ordered method of calculating a payor's income for support purposes in one year requires that same method be used in future years. Très intéressant.

The parties married in 2001, and had two children. After separation, they entered into a Domestic Contract in December 2009, which addressed child support under sections 3 and 7 of the *Federal Child Support Guidelines*, SOR /97-175:

16. The amount [of "base support and childcare"] payable above [in 2009] is the amount payable based on the Husband's base salary.

17. At the commencement of June of each and every year, commencing June 1, 2010, the Husband shall communicate to the Wife **the amount of his bonuses for the preceding year**, if any, and the parties shall exchange their completed and filed T1 Income Tax Returns as well as their Notices of Assessment. **The amount of any income over and above the Husband's base salary shall be added to the Husband's guideline income and the amount of child support payable by the Husband shall be recalculated based on the new guideline amount.** The Husband shall pay, retroactively to November 1 of 2009, the difference between what he has paid to the Wife for child support based on his base salary and the amount that he should have paid to the Wife based on his newly determined guideline amount. The amount payable pursuant to this section shall be paid in a lump sum from the Husband to the Wife and shall be paid by the Husband to the Wife on or before July 31, 2010. . . . [emphasis partially in original]

Paragraph 17 contemplates including bonuses in the calculation of *Guideline* income. For child support purposes "bonuses" were to be included in "income over and above base salary".

Paragraph 40 of the Contract provided that the matrimonial property division in it was intended to be final, and that neither spouse would make an additional claim to the *property* of the other, including any claim to RRSPs, future wages or "bonuses".

That is, while there would be no further claim to division of bonuses for property purposes (paragraph 40), for child support purposes, "bonuses" were to be included in "income over and above base salary" (paragraph 17).

The subsequent divorce Order (August 2010) noted that the Husband had *Guideline* income of \$78,000, and ordered child support on the same basis as the Contract.

An amended order granted on May 25, 2012 (the "2012 Order"), provided:

3. The [Husband] shall pay child support to the [Wife] in the amount of \$1,551.00 per month beginning June 1, 2012 and continuing on the first day of each and every month thereafter **until the children are no longer children of the marriage** as defined by the *Divorce Act*. Said support is based on the [Husband's] 2011 income of \$108,863.00. [emphasis added]

The income in the 2012 Order noted that the Husband's *Guideline* income for 2010 and 2011 was set after *deducting* amounts described as "bonus", "stocks", and "savings plan", providing no basis or analysis for why those amounts were excluded from *Guideline* income. That is, there was no explanation as to why "bonuses", which were *specifically* provided for in paragraph 17 of the Contract **and** the consent divorce judgment, were excluded. The Husband argued that the 2012 Order determined that paragraph 40 of the Contract prevailed over paragraph 17.

In November 2020, the Husband asked that his *Guideline* income for 2020 and forward be set at \$104,865. The Wife asked that the Husband's *Guideline* income be set at \$154,071, being the Husband's average earnings between 2017 and 2019. Then, in April, 2021, the Wife brought a further application asking for a retroactive child support adjustment back to 2012.

That set the stage; and a threshold issue was whether the Husband's *Guideline* income should continue to be calculated using the method in the 2012 Order. The Husband argued that the method of his income calculation was *res judicata*, and the same method of calculating his income was to be used in every future year and that, therefore, his "bonus", "stocks", and "savings plan" should be excluded from the calculation of his income. The Wife argued that the 2012 Order merely set the Husband's *Guideline* income for 2010 and 2011.

The court below concluded:

In 2012, these parties litigated the calculation of [the Husband's] guideline income. [The Husband] was then in the same job as he is now. The issue related to how his guideline income should be calculated in light of the matrimonial contract that was signed by the parties in December of 2009 and the interpretation of various clauses. Justice Lee issued a written decision outlining his reasoning in some detail, and he determined that the calculation of [the Husband's] guideline income should be the line 150 amount, net of bonus, saving plan deductions, and stock purchases . . .

As the parties have litigated this issue before the Court of Queen's Bench, it is res judicata, and I am bound by the earlier decision, which was not appealed. In the particular instance of this case, the calculations will be the net calculations. **[The Husband] is in exactly the same job that he was doing in 2011. His manner of compensation has not changed.** . . . [emphasis added]

Now there's something you don't see every day.

Believing himself to be on a bit of a roll, the Husband also argued that the 2012 Order actually fixed his child support obligation permanently at the amount specified in 2012 until the children were no longer children of the marriage.

This, the court below did not accept:

[The Husband's] argument is contrary to every authority in relation to child support. Child support is to be revised every year, as necessary, as the guideline incomes of the parents are rarely static. This wording was not intended to set child support in stone, and there is nothing in the written reasons of Mr. Justice Lee that would suggest it was his intention that the parties depart from the legislative scheme or that there would be a set amount of child support until the two children were no longer children of the marriage . . .

As a result, the court below set the Husband's *Guideline* income using the same *formula* as was used in the 2012 Order, but adjusted it to reflect the Husband's changing income in each subsequent year. This took the matter to the Court of Appeal, where the only issue was whether *res judicata* applied to child support — in this case. Specifically, did the doctrine of *res judicata* fix the method by which the Husband's income must be calculated after 2011.

We all recall that the two branches of the doctrine of *res judicata* — cause of action estoppel and issue estoppel — are meant to promote judicial economy and finality in litigation. For issue estoppel to apply, the issue must be the same as the one decided in the prior judicial decision, the prior judicial decision must have been final, and the parties to both proceedings must be the same, or their privies: *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328 (S.C.C.). Then, even after considering the test, the court has the discretion to not apply it: *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2434 (S.C.C.) at para. 33.

The Court of Appeal accepted that (as we all know too well) relitigation can be a "problem" in family law and that, as a general rule, *res judicata* applies in family law matters. However, it must be applied in a manner that is "sensitive to the family law context": *Foreman v. Foreman* (2005), 23 R.F.L. (6th) 273 (Alta. Q.B.) at paras. 9-10. Furthermore, there are two important exceptions to the application of the doctrine.

According to the Court of Appeal, the **first exception** is that interim family orders do not raise issue estoppel: *Stannard v. Stannard* (1991), 34 R.F.L. (3d) 249 (Alta. Q.B.) and *Foreman v. Foreman* (2005), 23 R.F.L. (6th) 273 (Alta. Q.B.). Generally, this is because interim orders are intended to be in place until trial or settlement. A trial judge must review interim orders and alter them as required: *MacMinn v. MacMinn* (1995), 17 R.F.L. (4th) 88 (Alta. C.A.); *Hartley v. Del Pero* (2010), 83 R.F.L. (6th) 305 (Alta. C.A.) at para. 9; *Prediger v. Santoro* (2016), 72 R.F.L. (7th) 273 (Alta. C.A.).

However, this broad proposition may be seen to be somewhat of an overstatement given the number of decisions that, in fact, apply *res judicata* to interim decisions (or hold that it *can* apply): *Earley-Kendall v. Sirard*, 2007 CarswellOnt 4088 (C.A.); *Diamond v. Western Realty Co.*, 1924 CarswellOnt 116 (S.C.C.); *Gupta v. Gupta*, 2018 CarswellOnt 5016 (S.C.J.); *B. (M.) v. Q. (R.)* (2015), 60 R.F.L. (7th) 59 (N.L. C.A.) (an interim order is final on the basis of the record and circumstances at the time it was made).

Perhaps a better way to consider the matter is that *res judicata* **does** apply to interim family law matters — but a court dealing with such matters is not bound by its rigid application where such rigidity would lead to an injustice and derail the primary objective of dealing with cases fairly and justly: *Tokaleh v. Hassan*, 2014 CarswellOnt 1449 (C.J.). Just a thought.

The **second exception**, according to the Court of Appeal, are the variation provisions of the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.) — which allow some final family law orders to be varied upon a material change of circumstances. The need to show a change in circumstances then balances the need for finality with the fact that family circumstances are dynamic. And that could, for example, include cancelling arrears that accumulated as a result of a prior order (that could otherwise be *res judicata*): *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.). The Court of Appeal describes these variation provisions as "statutory exceptions" to *res judicata*.

However, again, we're not entirely sure we agree here because a material change is defined to be a change such that the original order would have been different: *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.). That's not really an "exception" to the doctrine of *res judicata*. Rather, it is a situation where *res judicata* was never meant to apply. Again, *res judicata* applies to interim orders such that they are "final" *on the basis of the record and circumstances at the time it was made*: *B. (M.) v. Q. (R.)* (2015), 60 R.F.L. (7th) 59 (N.L. C.A.). Where circumstances change materially (in the case of an interim order, "in a compelling way" — *S.H. v. D.K.*, 2022 CarswellOnt 2219 (Div. Ct.)) that affects the suitability of the previous order, that order can be changed to ensure it continues to be appropriate pending trial. In any case, the distinction may amount to nothing more than fodder for debate. It likely makes no difference in day-to-day practice. (But to suggest otherwise is to suggest that absent an "exception" to *res judicata*, a custody determination would be forever.)

Here, the Husband was relying on an issue estoppel he claimed had arisen out of the 2012 Order. On its face, the 2012 Order simply stated that the Husband was to pay child support of \$1,551 per month based on *Guideline* income of \$108,863. The Order was actually silent as to the particular mode of income determination. Therefore, the first question to be answered was, "what did the 2012 Order decide, either expressly or by necessary implication?" Issue estoppel could/would arise from the issues decided in the previous decision.

Because the court below identified the issue as "the calculation of [the Husband's] *Guideline* income", arising from "the [Contract]", there were two possibilities as to the issue that had been decided in the 2012 Order:

- the method of calculating the Husband's *Guideline* income; or
- the interpretation of the Contract.

Time for some appellate detective work.

The Court of Appeal first considered whether the 2012 Order created an issue estoppel over the method of calculating the Husband's *Guideline* income.

Generally, the *Guidelines* contemplate that child support can change annually as income changes. This is made clear in section 14(a) of the *Guidelines*:

Circumstances for variation

14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

That is not in dispute. A *final* award made for a particular *past* year will generally create an issue estoppel for that particular year, the usual expectation is that awards in *future* years will be made based on income in those future years, after a fresh analysis. Obviously, a determination as to the amount of child support for one year is not meant to be fixed and non-variable for all time. If a final child support award is made one year, that is generally a final order for that year. If the amount is not subsequently adjusted (without obtaining an order confirming its applicability), the award for future years can generally be adjusted to reflect changed circumstances (subject to some limitations): *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.); *S. (D.B.) v. G. (S.R.)* (2006), 31 R.F.L. (6th) 1 (S.C.C.); *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.).

According to the Court of Appeal, in 2012, the "issue" before the Court was the calculation of the Husband's *Guideline* income, child support and section 7 expenses for 2010 - 2011. The "chambers judge did not purport to have before him any issue about *Guideline* income or child support in the years 2013 and following."

But the Divorce Order of August 2010 not only set child support for 2009. It also provided a formula for the calculation of the Husband's income in future years on which to base his child support. And while the 2012 Order varied the amount of child support prospectively, it *did not* purport to vary the formula.

On this question, the Court of Appeal adopted the words of the court below:

. . . Child support is to be revised every year, as necessary, as the guideline incomes of the parents are rarely static. This wording [in the 2012 Order] was not intended to set child support in stone, and there is nothing in the written reasons of Mr. Justice Lee that would suggest it was his intention that the parties depart from the legislative scheme . . .

And it then continues:

[25] . . . the [court below] is correct that child support, and the underlying guideline income, is a fresh issue in each year. It is inconsistent with the framework of the *Federal Child Support Guidelines* to suggest that the determination of income in one year estops judges who are charged with deciding Guideline income in future years.

[26] **Even if it were theoretically possible** for a court to grant an order respecting some aspect of child support that was intended to be permanent and universal that would be **unorthodox**. As noted, the presumption is that support obligations

are determined on an annual basis. **Unless there is something in the context of the order, or something specific in the order itself to make it clear that the decision was intended to be permanent and universally applicable to all future years**, the strong presumption is that the calculation of child support in one year does not create an issue estoppel with respect to calculations in future years. Since the issue before the 2012 chambers judge was determination of guideline income and child support for 2010-2011, there is no basis to think that the scope of the "issue" that was decided had any fixed future component.

[27] **While the doctrine of issue estoppel applies in family law, subject to the exceptions noted, it should be interpreted narrowly when it comes to orders relating to annual payments of support.** If the calculation of support in any one year is treated as binding for all future years, that would only encourage more appeals over relatively small amounts. The **expectations** of parties are generally that an order respecting support in one year is applicable to that year only, and does not restrain the flexibility of future judges when calculating support in future years. [emphasis added]

With these statements, we partially agree and partially disagree.

The wording in the 2012 Order in this case may not have been sufficiently clear to make it applicable, but there is nothing at all "unorthodox" in parties agreeing — or the Court ordering, the mode of income calculation for future years. In fact, it is something to be encouraged. But it must be done clearly.

Parties should be free to agree that support will automatically be calculated based on income for the prior year or a running average of incomes for specified previous years. They should be free to agree to income-averaging. They should be free to agree that income will or will not include amounts such as bonuses, stock options or other deferred compensation. They can agree as to the treatment of housing allowances. They can agree that incomes will or will not be subject to a gross up. They can agree that certain income, such as capital gains, will not be included in the calculation of income. And they can agree as to an amount of income to be imputed. Ultimately, while parties cannot "contract out of the *Guidelines*" — they can, and should be able to, agree as to the mode of income calculation. Such flexibility encourages agreement and discourages litigation. As but a few examples, see *Austin v. Austin* (2006), 29 R.F.L. (6th) 1 (B.C. C.A.); *Graham v. Graham*, 2007 CarswellOnt 752 (S.C.J.); *Shields v. Shields*, 2006 CarswellAlta 608 (Q.B.); *Miner v. Miner* (2004), 2 R.F.L. (6th) 105 (Ont. S.C.J.), aff'd, (2004), 6 R.F.L. (6th) 356 (Ont. C.A.); *Adamson v. Steed*, 2008 CarswellOnt 2641 (C.A.); *Therriault v. Therriault* (2008), 55 R.F.L. (6th) 245 (Alta. C.A.); *B. (B.L.) v. M. (J.W.)*, 2009 CarswellBC 666 (S.C.); *de Somer v. Martin* (2012), 22 R.F.L. (7th) 287 (Ont. C.A.); *Myers v. Vickar* (2012), 26 R.F.L. (7th) 227 (Ont. S.C.J.); *Pupura v. Bates*, 2012 CarswellOnt 16445 (S.C.J.); *Gagnon v. Gagnon* (2012), 32 R.F.L. (7th) 236 (N.S. S.C.); *Reid v. Reid* (2015), 55 R.F.L. (7th) 41 (B.C. S.C.); *Goodkey v. Goodkey*, 2015 CarswellAlta 2269 (C.A.); and *Harras v. Lhotka* (2016), 83 R.F.L. (7th) 272 (B.C. C.A.).

The Court of Appeal then considered whether the 2012 Order created an issue estoppel as to the proper interpretation of the Contract. What was the Husband's obligation "in light of the contract that was signed by the parties in December of 2009 and the interpretation of various clauses?"

A judgment interpreting a particular clause of a contract can create an issue estoppel with respect to the interpretation of that provision of the contract: *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2003 CarswellAlta 120 (C.A.); *Northmont Resort Properties Ltd v. Reid*, 2018 CarswellAlta 3271 (Q.B.). While the future application of the contract may be an open question, the base interpretation of the contract cannot just be relitigated — although the boundary between the base interpretation and future application may not always be clear.

In this case, neither the 2012 Order nor the supporting reasons offered any analysis of the clause in the Contract relating to child support. Therefore, no issue estoppel arose.

Therefore, the Court of Appeal determined that the only "issue" determined by the 2012 Order, which might raise an issue estoppel, was the Husband's *Guideline* income and child support obligations for the years 2010-2011. Despite its wording, the 2012 Order did not fix any formula by which the Husband's future *Guideline* income was to be determined.

The Court then ends with these thoughts:

[34] . . . Family law decisions are polycentric and engage the best interests of the children, who are not parties to the litigation or any contract between their parents. Issue estoppel must be applied with that context in mind. When it comes to determining child support, which is routinely calculated on an annual basis to reflect the changing incomes of the parents and the changing needs of the children, the doctrine of issue estoppel should not be strictly applied. In this case, even if the doctrine was triggered the court's discretion would be exercised to displace the doctrine for the calculation of child support in the years after 2012.

Save for the final sentence, we agree.

Now, please pardon us while we go res judicate.

Offers to Settle are Neither Horseshoes nor Hand Grenades: Close Don't Count

Mulik v. McFarlane, 2023 CarswellOnt 6684 (C.J.) — Sherr J.

Making offers to settle accomplishes a few objectives. First, an offer to settle clearly sets out to the other side the terms on which your client is prepared to settle the case. Second, because of the automatic cost consequences in most jurisdictions of not accepting an offer that should have been accepted (because the other side beats their own offer), an offer to settle can put real pressure on the opposing party to settle. In Ontario, it is Rule 18(14) of the *Family Law Rules*, O. Reg. 114/99.

Therefore, while offers to settle can no longer be considered "mandatory" or "obligatory", and while it is no longer considered "unreasonable" for a party to not make an offer to settle [see *McGuire v. Bator* (2022), 74 R.F.L. (8th) 255 (Ont. C.A.) and *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.)], making an offer to settle — or, sometimes, multiple or successive offers to settle — is strategic and can only benefit your client.

And if making offers to settle is strategic, making *severable* offers to settle is highly strategic. Here's why.

The Court released a decision on parenting and support issues. The mother was successful, and the Court invited her to make written cost submissions. She sought costs of \$13,500.

As we all know, modern costs rules are designed to foster three fundamental purposes:

- to partially indemnify successful litigants;
- to encourage settlement; and
- to discourage and sanction inappropriate behaviour by litigants.

It has become routine for courts to employ costs as a tool to further the goals of the efficient and orderly administration of justice: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 CarswellBC 3040 (S.C.C.) at para 25.

Rule 18 (14) of the *Family Law Rules* specifies the consequences of a party failing to accept an offer to settle that is as good as or better than the trial result of the person making the offer — that is, where "the party who made the offer obtains an *order that is as favourable as or more favourable* than the offer." That successful party is entitled to costs to the date the offer was served and *full recovery of costs* from that date. That is pretty good incentive to make aggressive offers to settle and to give serious consideration to offers made by the other side.

However, when it comes to automatic cost consequences, offers to settle are neither horseshoes nor hand grenades — close don't cut it. The offer must be *as good as or more favourable* than the trial result: *Gurley v. Gurley*, 2013 CarswellOnt 12328 (C.J.).

Here, the mother had made an offer to settle the case. Her offer was reasonable. But it was not more favourable to the father than the result at trial and did not attract the costs consequences set out in Rule 18(14).

Courts have written about the importance and benefits of severable offers: *M.J.L. v. C.L.F.*, 2022 CarswellOnt 11250 (C.J.); *P.I. v. R.O.*, 2022 CarswellOnt 5472 (C.J.); *M.A. v. M.E.*, 2021 CarswellOnt 18093 (C.J.). And the result here offers a good example as to why a severable offer should be considered.

The mother's offer to settle the parenting issues was *more favourable* to the father than the trial result. Her offer to settle the child support issues was *as favourable* to the father as the trial result. But the mother's offer fell short on the issue of spousal support; at trial, the father did better on the issue of spousal support than the mother's offer. The mother had offered indefinite support of \$2,400 a month, and the final order called for time-limited support, starting at \$2,400 and then reducing to zero over seven years.

Had the mother made her offer severable — or at least severed the spousal support issue from the rest of her offer — she would have met the pre-conditions for the automatic cost consequences in Rule 18(14), at least on the parenting and child support issues.

As a result, the mother was awarded costs of \$8,500. Had the issue of spousal support been severable, she would unquestionably have received significantly more.

There is really only one reason to not make a severable offer, and that is if your client would be very upset if one issue was settled in one fashion without another issue similarly settled. For example, a client may not want to agree to shared custody without knowing how child support is to be determined. But that can easily be accounted for by making the parenting schedule and child support non-severable.