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— Franks & Zalev - This Week in Family Law

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Early Retirement and Star Wars — May the Courts Be With You

Caron v. Caron, 2023 CarswellAlta 1136 (K.B.) — Yungwirth J.

This case deals with a payor spouse's early retirement. It was particularly interesting as it involved a payor spouse seeking to vary support based on only his stated *intention* to retire and in the face of non-disclosure and considerable support arrears. Place your bets.

The parties separated in 2010 after 34 years of marriage. The Husband was 69 years old. The Wife had not worked outside of the home for 32 years and, due to health issues, was unlikely to be able to work again. Shortly after separation, the Husband was ordered to pay \$3,500 a month in interim spousal support.

The Husband was, shall we say, "lackadaisical" in his payment of support and provision of disclosure; by the time of the trial in March of 2017, he was \$6,478.96 in arrears of interim spousal support. After a two-week trial, the Husband was ordered to pay \$4,500 a month in spousal support based on an income of \$125,000.

The Husband failed to pay the support, and by June 2018, when he brought an application to stay enforcement of spousal support, cancel arrears and terminate spousal support, he was **\$81,560.79** in arrears.

In her response, the Wife argued that the Husband's failure to pay the court-ordered support had caused her severe financial hardship, forcing her to rely on social assistance, having to live on approximately \$800 a month.

In October of 2018, despite the Husband being over \$80,000 in arrears, the Court ordered that the spousal support Order be stayed on the condition that the Husband pay \$200 a month. It is unclear how the Husband managed to convince the Court to do this, as he had not provided proper disclosure for 2017 or 2018. This can only be explained by expert application of the Jedi Mind Trick. (If you don't get the reference, this is not the Newsletter you're looking for.)

The matter came before Justice Yungwirth in April of 2019. Her Honour set support using an income of \$60,000 for the Husband and increased the monthly payment amount from \$200 to \$1,500. Justice Yungwirth set this amount on a "pre-disclosure" basis and remained seized of the matter. Her Honour also completed a few practical matters, such as actually having the Husband's pension divided as had been ordered at the 2017 trial.

Justice Yungwirth also set out a series of disclosure orders with which the Husband had to comply if his matter was to proceed. He did, eventually, do so.

At the hearing of the variation application, the Husband argued that the March 2017 spousal support order should be varied because he was about to retire. He claimed that a lifetime of working as a welder had caused him a number of health problems and that he would only be able to work at a reduced level for the next year before retiring altogether. The Husband was 69 years old at the time the variation was heard. The Wife was 65.

Justice Yungwirth confirmed that the Order being varied was the final spousal support Order from March 2017, and not any of the interim support orders. A court can vary an existing support Order under section 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), with subsections 4.1 and 7 being particularly important:

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Objectives of variation order varying spousal support order

(7) A variation order varying a spousal support order should:

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Now, as set out by the fine folks in Ottawa in *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.), a court must first determine if the conditions for variation — a material change in circumstances — exist. If they *do* exist, a court can then determine what variation of the existing order — if any — ought to be made in light of the change in circumstances. In making this determination, the court must consider the four objectives of spousal support set out in subsection 17(7) of the *Divorce Act*. Absent a material change, there is no jurisdiction to vary a support order: *Litman v. Sherman* (2008), 52 R.F.L. (6th) 239 (Ont. C.A.); *Droit de la famille - 132380* (2013), 37 R.F.L. (7th) 1 (C.A. Que.); *LMP v. LS* (2011), 6 R.F.L. (7th) 1 (S.C.C.).

In *LMP v. LS* (2011), 6 R.F.L. (7th) 1 (S.C.C.) (a to-this-day "must read") the Supreme Court confirmed the approach set out in *Willick*, and emphasized that a material change means a change which, if known at the time, would likely have resulted in different terms. The change must be substantial, continuing, and not considered in the prior Order.

In *Caron*, Justice Yungwirth is clear — and correct — that use of the terms "foreseeable" or "foreseen" in reference to when the previous Order was granted *should be avoided*. Words like "foreseeable" and "foreseen" are "*Miglin* words" not "*Willick* words." Circumstances such as retirement are always foreseeable — but that does not mean that retirement cannot be a material change. With respect to material change, the question is best thought of as "was this circumstance considered as part of the prior order?" or "what was actually contemplated by the parties or the Court in the previous agreement or Order?" Otherwise, we get into all sorts of trouble. For excellent explanations as to the differences, see *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.); *Stones v. Stones* (2004), 48 R.F.L. (5th) 223 (B.C. C.A.); *Moazzen-Ahmadi v. Ahmadi-Far* (2016), 95 R.F.L. (7th) 88 (B.C. C.A.); *Goodkey v. Goodkey*, 2015 CarswellAlta 2269 (C.A.); *Droit de la famille - 141364*, 2014 CarswellQue 5386 (Que.); *Q.D.T. v. H.L.D.*, 2020 CarswellNB 142 (C.A.).

With this framework established, Justice Yungwirth considered the facts before her. A threshold issue was whether or not the Husband's application was premature as he had not yet actually retired; he only intended to retire — albeit quite imminently. Generally, the law frowns on variation applications based on anticipated future events: *Messier c. Delage* (1983), 35 R.F.L. (2d) 337 (S.C.C.); *Dufresne v. Dufresne*, 2009 CarswellOnt 5617 (C.A.); *Rondeau v. Rondeau* (2011), 90 R.F.L. (6th) 328 (N.S. C.A.); *Vaughan v. Vaughan* (2014), 44 R.F.L. (7th) 20 (N.B. C.A.); *Carey v. Carey* (2021), 59 R.F.L. (8th) 440 (B.C. S.C.).

In *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.), the Ontario Court of Appeal arguably developed an exception to this general principle: the "certainty of retirement exception." *Schulstad* involved a long-term traditional marriage. The Husband was a 69-year-old surgeon, and he applied to reduce his spousal support in 2 ¹/₂ years, on his anticipated retirement date. The Court of Appeal found that there was enough evidence to allow the Court to conclude that the Husband's retirement was a certainty, and that there was also sufficient evidence regarding the parties' respective incomes and assets to enable the Court decide as to whether the Husband's application was premature:

[21] The issue of prematurity is an issue at the first stage of the *Willick* analysis. In other words, prematurity is an issue impacting the threshold question of whether or not there has been a material change in circumstances. It is well-established that any decision to vary must not be made in accordance with events which may or may not occur: *Messier v. Delage*, [1983] 2 S.C.R. 401 (S.C.C.), at p. 416. An application to vary will be premature if based on speculative or uncertain changes in circumstances: *Dufresne v. Dufresne*, 2009 ONCA 682 (Ont. C.A.).

...

[28] **In most cases**, such an application so far in advance of the alleged material change in circumstances will run counter to the **fundamental principle articulated in both legislation and jurisprudence that a material change must have already occurred** in order for a court to have jurisdiction to vary a final order. This is because there is a real likelihood that the financial disclosure and other evidence in support of an alleged material change in circumstances will be speculative due to its prematurity. Encouraging premature, speculative applications to vary, which lack the necessary solid and certain evidentiary foundation, will simply increase the already extremely high costs of litigation in family law proceedings. [emphasis added]

That is, the Court must be satisfied that retirement is a near certainty, and there must also be sufficient evidence about the payor's current income and what it will be after retirement.

In *Caron*, the Husband was 69 years old. He claimed that his health issues were becoming worse as he got older due to the physical demands of his work as a welder. He stated that he wished to retire, but he wanted to know what his spousal support obligation would be in the event of his retirement.

The Husband had not set a retirement date. There was no evidence that he had given notice to his employer that he intended to retire. He did begin collecting his union pension and CPP pension, but his overall circumstances, including his significant debt load, a bankruptcy in 2018 and his spousal support obligations had required him to continue to work.

Justice Yungwirth found that the Husband's advancing age, his worsening health issues and his desire to retire, considered together, amounted to a material change in circumstances. Her Honour was satisfied that the Husband had provided sufficient evidence to allow the Court to conclude that his retirement was a certainty.

With a material change established, Her Honour then considered the appropriate amount of spousal support. Justice Yungwirth took note of the Wife's difficult financial circumstances, her health issues and the impact she had suffered as a result of the Husband's failure to pay support. The Wife remained very much in financial need.

First, the Court set the arrears of support based on the Husband's actual income between 2017 and 2023 at \$86,838. This was a *significant* discount as compared to what was owing under the final spousal support Order from March 2017, being \$217,419.43.

Her Honour also pointed out that the Husband had been given a benefit by using the mid-range of the *Spousal Support Advisory Guidelines*, because with a marriage of this length, an argument could be made that the high range was more appropriate.

Justice Yungwirth found that, due to the Husband's failure to disclose, the income used to calculate the Husband's spousal support obligation at the trial in March 2017 was higher than his actual income, but the Court does not attach any consequences for that failure to disclose on the Husband. This is in stark contrast to the Supreme Court of Canada's direction regarding payors attempting to vary retroactive child support orders in *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.). It is also at odds with cases that deal with a variation application where a payor seeks to reduce support after income was previously imputed to them on account of insufficient disclosure; generally the payor must show that the basis for imputation has changed: *Trang v. Trang* (2013), 29 R.F.L. (7th) 364 (Ont. S.C.J.); *Power v. Power* (2015), 67 R.F.L. (7th) 138 (N.S. S.C.); *Ruffolo v. David* (2016), 75 R.F.L. (7th) 16 (Ont. Div. Ct.); *YMS Properties Inc. v. 9347-9285 Québec inc.*, 2022 CarswellQue 1309 (C.S.) at 338; *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.); *Sugg v. MacNeil* (2016), 73 R.F.L. (7th) 171 (N.S. S.C.); *Beissner v. Matheusik*, 2015 CarswellBC 1848 (C.A.); *Pustai v. Pustai*, 2018 CarswellOnt 22491 (C.A.); *Janiten v. Moran* (2019), 32 R.F.L. (8th) 280 (Alta. C.A.).

Given the Wife's ongoing need and the possibility of the Husband continuing to work, Justice Yungwirth ordered that for as long as he was working, the Husband was to pay \$1,000 a month in spousal support based on the employment income he claimed he might earn. Upon retirement, the monthly amount would drop to \$328 a month.

Finally, Justice Yungwirth ordered that the Husband pay the \$86,000 of arrears by way of monthly payments of \$500 for as long as he was working — and that those payments reduce to \$75 when he retires. By our math, it will take the Husband approximately 603 years to pay off the support arrears . . . without interest.

Can a Trust Claim Be Weaponized? Still Constructively and Resultingly, "No."

Karatzoglou v. Commisso, 2023 CarswellOnt 6030 (C.A.) — Harvison Young J.A.

In equalization jurisdictions, parties obviously want to assert as high a net worth as possible at the time of marriage (or the beginning of the relationship) and a low net worth at the time of separation so as to minimize their increase in net worth over the course of the relationship. That is standard strategic fare.

However, in both equalization and division of property jurisdictions, in the case of an asset that has declined in value during the relationship or post-separation, a titled spouse may wish the other spouse also has/had an ownership interest so as to force them to share in the declining value of the asset. And to do that, many years ago some clever spouses (or, should we say, some clever lawyers) came up with the idea of the "reverse resulting trust" or "reverse constructive trust" where by an ownership interest could be foisted/imposed upon the other spouse that was not actually claiming an interest in the property.

It may have been a clever idea, but the idea of imposing a trust interest on the other spouse was not looked upon favourably by the Courts. See, for example: *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. H.C.); *Amsterdam v. Amsterdam* (1991), 31 R.F.L. (3d) 153 (Ont. Gen. Div.); *Arshinoff v. Arshinoff*, 1993 CarswellOnt 1551 (Gen. Div.); *Arndt v. Arndt* (1993), 48 R.F.L. (3d) 353 (Ont. C.A.); *Serra v. Serra* (2007), 36 R.F.L. (6th) 66 (Ont. S.C.J.); and *Marshall v. Marshall*, 2017 CarswellOnt 10016 (S.C.J.) ("*Marshall*").

The reasons were well-explained by Justice George (as he then was) in *Marshall*. Generally, courts were concerned that to allow such claims of "reverse trust" (be it resulting or constructive) would lead to every asset purchased during a relationship possibly being subject to such a claim — and that certainly did not lead to judicial economy. Further, as Justice Weiler found in *Arndt v. Arndt* (1993), 48 R.F.L. (3d) 353 (Ont. C.A.) (albeit dissenting on the application of trust principles to that specific case):

[6] The reverse constructive trust sits uncomfortably with trust principles. There is no real deprivation to the spouse who has put in work or money to the property. In fact it is this lack of deprivation that the titled spouse is complaining about. The deprivation to the titled spouse who has equally contributed work or money to the property does not arise as a result

of the other spouse's actions but as a result of the fixed date chosen by the legislature for the calculation of the equalization payment.

So that was that. A clever idea that went down in flames.

But clever counsel cannot be deterred, and like an unjust enrichment Phoenix rising from the resulting trust ashes, it was not that long before similar, but different, arguments arose whereby upon separation one spouse ("Spouse A") claimed that the other spouse ("Spouse B") had a beneficial interest — not in the property of Spouse A — but in property owned by a third party, such as a parent. This would obviously serve to increase Spouse B's net worth on separation and reduce the equalization payment owed by Spouse A (or further increase the payment owed by Spouse B). As we said — clever — and interesting because this does not invoke the same floodgates argument as would a reverse trust argument.

This issue was recently addressed in *Morris v. Nicolaidis*, 2021 CarswellOnt 6258 (S.C.J.), where the husband sought to advance a trust claim on behalf of the wife against her father for a beneficial interest in a condominium at the date of separation. Justice McGee dispatched with that claim as follows:

[32] At the heart of this motion is an interesting question. Can a person advance a trust claim on behalf of a former spouse in order to increase that spouse's net family property and consequently, benefit the person's claim for, or defense to an equalization payment?

[33] A claim for a constructive trust is a claim in equity that is privately held. It is not a public interest claim. The common law principle relating to private interest standing states that "one cannot sue upon an interest that one does not have." [citation omitted]

[34] The Court of Appeal for Ontario outlined the legal tests for private and public interest standing in *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, a case in which a bank employee brought a civil suit against her employer because she believed that she had uncovered wrongdoing on the part of the bank against a third party. The Court of Appeal upheld the motion judge's dismissal of the case under Rule 21.01 (1), agreeing with the trial judge's analysis that the appellant lacked private interest standing because she did not have any financial interest in the outcome of the litigation, and had not pled any facts that demonstrated a direct personal legal interest in the trusts that were allegedly breached by the Bank.

.....

[36] **Can an equalization claim create a direct personal legal interest that confers standing to make a trust claim on behalf of a spouse or a former spouse?**

[37] **I find that it cannot. An equalization payment cannot change the titled or beneficial ownership of property between spouses.** The equalization scheme in Ontario is not based upon a division of property, but rather, it recognizes a spouse's non-financial contributions to a marriage by equalizing the increase in value in each party's net family property between the date of marriage and the date of separation, subject to variation per section 5(6) of the *Family Law Act*.

[38] **A claim that a third person holds property in trust for a non-titled spouse, or that a non-titled spouse has a beneficial interest in property, or a monetary claim arising from the acquisition, maintenance or use of that property can only arise from the personal, direct deprivation of the non-titled spouse. An equalization claim is, at best, an indirect legal interest. It is therefore insufficient to confer standing to a person to make a trust claim on behalf of a non-titled spouse or former spouse.**

[39] **Even trust claims between married persons are exceptional** because "[i]n the vast majority of cases any unjust enrichment that arises as a result of the marriage will be fully addressed through the operation of the equalization provisions of the *Family Law Act*," see *Martin v. Sansome*, 2014 CarswellOnt 759 (ONCA.) Writing for a unanimous court, Justice Hoy envisions in *Martin, supra*, that it will be a rare case in which monetary damages for unjust enrichment cannot be

adequately addressed by an equalization payment; and in those cases, a variation of share per section 5(6) of the *Family Law Act*, should be invoked before consideration of a trust claim.

[40] Although not in evidence here, there may be a situation in which a meritorious trust claim is not advanced by a non-titled spouse. **In such a case, the other spouse cannot step into the non-titled spouse's shoes and advance the claim himself because he has no direct personal legal interest in the trust claim; but he could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act*.** [emphasis added]

In *Karatzoglou*, a variant of this issue arose but as part of a motion for security for costs of an appeal. It arose in the discussion as to whether the underlying appeal was frivolous and vexatious and in considering the likely merits of the appeal.

Justice Harvison Young dealt with the issue as follows:

[22] The underlying problem with [the Appellant's] position on this security for costs motion is that **it is premised on her assertion of an indirect trust claim which, as the authorities have recognized, effectively undermines the equalization scheme** as established by the *Family Law Act*, R.S.O. 1990, c. F.3. As McGee J. wrote in *Morris*, at para. 40, which the summary motion judge cited, it is not open to a spouse to step into the other spouse's shoes and advance a trust claim against a third-party on their behalf in the context of equalization proceedings. However, a spouse "could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act*." [emphasis added]

Therefore, whereas Justice McGee in *Morris* shut the door on one spouse making a trust claim on behalf of a former spouse, in *Karatzoglou*, Justice Harvison Young shut the door on one spouse actually claiming against a third party on behalf of the second spouse. By our count, that is two solid door closings.

However, while we agree with Justices McGee and Harvison Young, we do emphasize that there are *unquestionably* times where a spouse could assert a wholly valid resulting trust or unjust enrichment claim against a third party on separation, but does not actually assert such a claim, as that would increase their net family property. And that *unquestionably* creates unfairness. And if the reverse and "imposed" resulting and constructive trust are pushing up daisies, the only recourse we can see is to resort to a claim for unequal division, specifically s. 5(6)(h) of the *Family Law Act* in Ontario, which provides for unequal division where an equal division would be "unconscionable" having regard to "any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of **property**." As luck would have it, the definition of "**property**" in the *Family Law Act* is not restricted to property owned by the spouses and includes beneficial interests. Otherwise, we'd have a problem.