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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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M.M. v. B.M., 2023 CarswellMan 8 (K.B.) — MacPhail J.

Note: Please note that we have added a corrigendum to the end of this comment.

In *M.M.*, the Court awarded $500,000 in lump sum spousal support to a psychiatrist earning over $300,000. The rest of this comment is devoted to answering the question: "What???"

The parties in this case were both born in Tehran, Iran. They met in medical school in Iran and married there in June of 1993. At the time of marriage, they entered into a Mehrieh (a marriage contract, sometimes also referred to as a Mahr or Maher) requiring the Husband to pay the Wife a certain number of gold coins, on demand.

In 1997, the parties obtained their medical degrees from the Tehran University of Medical Sciences. After graduation, they both worked for several years as doctors earning comparable incomes.

In 1998, the parties' son and only child was born. The Wife took a maternity leave but went back to work after several months. The parties' families helped with childcare and also supported the family in other ways, including by gifting them real property.

The parties both decided that they wanted to leave Iran and to pursue further education and career opportunities in another country, ideally in the brain sciences field. They worked together to complete their applications and to find positions outside of Iran. They both obtained graduate research positions at McGill University and moved to Montreal with their son in September 2001.

The parties spent the next four years pursuing doctoral and post-doctoral studies in the neuroscience field at McGill. The Husband received his Ph.D. in 2005 and the Wife in 2006. In mid-2008 they each completed a post-doctoral fellowship at McGill. Their incomes during the years they pursued their studies at McGill were equal, between approximately $17,000-$40,000 per year. The Husband was also a co-inventor on two projects that resulted in two patented inventions.

Both parties tried for many years to obtain a medical residency. The Wife first obtained a residency in psychiatry in Winnipeg through the University of Manitoba. Soon after, the Husband obtained a residency in Winnipeg in neurology. The parties moved to Winnipeg in July 2008 to begin their respective residencies.

In June of 2012, the family moved to the area of Boston, Massachusetts in order for the Husband to complete a one-year neuro-ophthalmology clinical fellowship at Harvard. The Wife arranged to complete the remaining six months of her psychiatry residency outside of Winnipeg and obtained an unpaid research fellowship at Harvard.

In mid-2013, the parties and their son returned to Winnipeg. Having both completed their residencies, they began practicing medicine; the Wife as a psychiatrist, and the Husband as a neurologist and neuro-ophthalmologist. They established two joint medical corporations. The second, Brain Matters Inc., acquired ownership of the Husband's medical patents.

After they had spent over two decades establishing their respective medical careers, the parties separated on April 17, 2015, just under two years after they returned to Winnipeg and started their medical practices. The Wife filed a petition for divorce in September 2015.

The parties signed a comprehensive Separation Agreement on January 6, 2020, resolving all property issues between them except for their divorce, the Wife's claim for spousal support and costs. The Agreement also addressed the Mehrieh — the Husband paid the Wife $150,000 in satisfaction of it — and *Iranian* divorce, *which was granted on November 3, 2020*.

The parties were unable to resolve spousal support and attended a trial to determine the issue. Before we get to the actual support analysis, the very fact the Wife was claiming (and ultimately awarded) support after a foreign divorce is a problem. We have written on this issue several times — see, for example, the 2020-07 (February 24, 2020), 2020-18 (May 11, 2020), 2020-19 (May 18, 2020) and 2022-43 (November 21, 2022) editions of *TWFL* — but a Canadian Court cannot award spousal support pursuant to the *Divorce Act*, RSC 1985, c 3 (2nd Supp) (the "*Divorce Act*") after a valid foreign divorce. By Constitutional imperative, a Canadian Court can only award support under the *Divorce Act* if it is corollary to a Canadian divorce: *Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.); *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 91 (B.C. C.A.); *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 59 (B.C. C.A.); *Leonard v. Booker* (2007), 44 R.F.L. (6th) 237 (N.B. C.A.); *Harman v. Harman* (2009), 75 R.F.L. (6th) 50 (Alta. C.A.); *Okmyansky v. Okmyansky* (2007), 38 R.F.L. (6th) 291 (Ont. C.A.); *Cheng v. Liu* (2017), 94 R.F.L. (7th) 23 (Ont. C.A.).

And it does not seem to matter that support may have been claimed in Canada before the foreign divorce was granted (or even than an interim award was made in Canada): *Stefanou v. Stefanou* (2012), 47 R.F.L. (7th) 385 (Ont. S.C.J.); *S. (R.N.) v. S. (K.)* (2013), 42 R.F.L. (7th) 35 (B.C. C.A.); *Novikova v. Lyzo* (2019), 31 R.F.L. (8th) 140 (Ont. C.A.); *Simpson-Campbell v. Stark-Campbell* (2022), 80 R.F.L. (8th) 467 (Ont. S.C.J.).

Here, the parties had already been divorced in Iran; and no Canadian divorce, no support under the *Divorce Act*.

In addition, it would seem the Wife should not have been able to claim support under the Manitoba *Family Maintenance Act*, CCSM c. F20 (the "*FMA*"). Section 9(1) of the *FMA* provides that a "spouse" or common-law partner "may apply to a court for an order of support . . . ". However, s. 1 of the *FMA* defines "spouse" as "the person who is married to that spouse" — and "spouses" means two persons who are married to each other. That is, the definition of "spouse" does not include a former spouse.

Here, the parties had already been divorced in Iran; and the *FMA* does not provide for support for former spouses.

Therefore, query how a support order was possible in this case. We highly suspect the issue was not raised.

But moving right along . . .

At the trial, the Wife took the position that she was entitled to spousal support on a compensatory, non-compensatory and contractual basis. The Husband disputed the Wife's entitlement to spousal support on the basis that she was fully independent, and had no entitlement to or need for spousal support given that she was a practicing doctor, was earning a six-figure income after separation, and had significant earning potential. (The Wife's own expert determined she could earn between $300,000-$375,000 per annum as a psychiatrist.)

The parties' incomes fluctuated from year-to-year. The Wife calculated that the Husband's average annual income in the five years after separation was $831,000 and hers was $328,000. And, because they had spent the vast majority of their marriage working and studying to become licensed medical doctors in Manitoba, and only practiced for two years before separation, their income during their marriage did not reflect what they would likely earn post-separation. As a result, the Wife retained and called at trial an expert to prepare a report on the issue of physician's remuneration and the Husband and Wife's earning capacity.

Justice MacPhail ordered the Husband to pay **lump sum** spousal support to the Wife in the amount of **$500,000**.

In so doing, and despite finding that the Wife was earning a six-figure salary, Justice MacPhail found that the Wife was entitled to "some" spousal support "as a result of her role and contribution to the [Husband's] professional success." While she rejected that the Wife was entitled to spousal support on a contractual basis, she found entitlement to support was established on both compensatory and non-compensatory grounds because there was a merger of the parties' finances over time, a joint intention to share the benefits of their incomes through their medical practices, and the Wife suffered an economic disadvantage as a result of the separation when she lost access to the Husband's higher income and higher standard of living the parties were beginning to — and were meant to — enjoy in the latter part of their marriage:

> [213] Until their separation, the parties clearly viewed their efforts as a joint endeavour as the [Wife] indicated. For almost 22 years they merged their finances, shared their assets and made decisions based on the benefits to their family unit, not individual members. They both worked hard, they supported each other, they both wanted to pursue education outside of Iran and worked hard to obtain opportunities to do so, and they shared the incomes that they received. They had joint bank accounts. When they each sold properties they received as gifts from their family, the proceeds were used for purposes of their family unit, to move to Canada and to purchase their first home in this country. Both their home in Montreal and the former family home in Winnipeg were jointly owned. When the parties commenced practicing medicine, they established a joint medical corporation in which their MHS and other fees were deposited, and thereafter salaries were attributed to each of them, with each party having equal shares in the corporation despite the [Husband's] higher billings.
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> [214] The [Wife's] evidence was that their intention throughout their marriage was to **work hard and sacrifice in the short term**, so that, once their academic and professional credentials were achieved, **they would share in the fruits of their labour and benefit as a family from the sacrifices that they both made over many, many years.**
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> [215] The [Husband], for his part, became extremely upset when questioned about the plan the [Wife] contended they had, described by his lawyer as "sharing the spoils". The [Husband] was adamant that was never their intention. He stated that they each intended to work independently in their own field and be independent from one another. That may have become his position after the parties' separation, but it was certainly contradicted by the evidence of his behaviour and actions, and those of the [Wife], prior to their separation and even for a period of time thereafter.
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> [216] While there was no express contract entered into between the parties for the [Husband] to pay indefinite spousal support to the [Wife] in an amount that would equalize (or narrow the gap between) their incomes in the event their relationship ended, I am satisfied from the evidence provided to me that **the parties merged their finances throughout their marriage and cohabitation and had a joint intention to share the benefits of the incomes they received through their medical practices.** They did so through their joint medical corporation and jointly held assets. [**emphasis** added]

Other factors that influenced Justice MacPhail finding in favour of the Wife's entitlement to spousal support include (forgetting the seeming lack of a statutorily-supported claim for the moment):

- The Wife was more involved in parenting their son and managing the household, allowing the Husband to focus on his research and career.

- The Wife made sacrifices to her own career to ensure that ***both*** parties advanced theirs in Canada. For example, after the Wife was accepted into a psychiatry residency, and a residency in neurology opened up, she did not apply for the position despite her interest in the field. The Husband applied for the residency and successfully obtained it. The Wife also moved to Boston when the Husband obtained a paid post-doctoral clinical fellowship at Harvard which delayed the completion of her residency. And when the Husband had trouble finding a neurology position in Winnipeg after he finished his clinical fellowship at Harvard, she strongly advocated for and promoted him, and he was able to secure a position so that both parties could return to and practice in Winnipeg.

> • The Husband's earning capacity was essentially double that of the Wife's, for reasons which were not within her own control but which were as a result of the compensation structure of practicing psychiatrists in Winnipeg (which did not apply to the Husband's field). The Wife's expert opined that she could earn between $300,00-$375,000 per year as a full-time practicing psychiatrist whereas the Husband could earn between $800,000-$1,150,000 per year. Both parties clearly contributed in a very meaningful way to the other's professional success. It would be unfair for the Husband to be the only one to benefit financially from his higher income, income which he earned as a result of the years of sacrifice, hard work and mutual support of ***both*** parties.
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> • There was significant income disparity between the parties. In comparing their Manitoba Health Services billings, Justice MacPhail highlighted that the Husband's billings were between approximately $370,000-$900,000 more than the Wife's. [The Husband's billings generally exceeded the Wife's billings by $600,000-$900,000 per year. The reason it was lower in two years since separation was a result of the Husband re-partnering and spending time in Ontario which reduced the number of hours he worked.] While Justice MacPhail acknowledged that this, on its own, did not establish entitlement to spousal support, the fact of it in this case demonstrated that there was a negative impact on the Wife at the end of the relationship.

Her Honour rejected the Husband's argument that the Wife had no need for spousal support because her post-separation income was higher than it was for much of the marriage and therefore, her standard of living was higher than for much of the marriage. Justice MacPhail rightly noted that "need" differs from one family to another, and is informed by (or viewed through the lens of) the standard of living enjoyed by the parties. In *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.), the Ontario Court of Appeal noted:

> [53] Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation. . . .

[See also *Allaire v. Allaire* (2003), 35 R.F.L. (5th) 256 (Ont. C.A.) at para. 21, and *Yemchuk v. Yemchuk* (2005), 16 R.F.L. (6th) 430 (B.C. C.A.) at paras. 41, 48-49.]

Justice MacPhail found that the Husband's position overemphasized the parties' standard of living ***before*** the parties obtain their medical licences and actually began practicing medicine. The standard of living that mattered to Justice MacPhail was *that enjoyed during the last two years* of the parties' relationship when they actually began practicing medicine and earning an income.

Then, interestingly, Justice MacPhail considers the ***duration*** of spousal support before considering the amount:

> [276] I have considered the unique circumstances of this relationship where, as the [Wife] rightly pointed out, each party's professional qualifications and, therefore the foundation for their future income earning capacity, were acquired during the course of the relationship, with the other's support, but that it was only for a short period, the last two years, of the parties' relationship that their efforts began to bear fruit.
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> [277] Given the duration of the parties' relationship, their respective incomes and income earning capacities, and the negative impact of the end of the relationship on the [Wife], I order that the [Husband] **pay spousal support for a seven-year period from 2016 through to and including the end of 2022**, a period of seven years or approximately one-third of the time they cohabitated during their marriage. [**emphasis** added . . . and note the retroactive element]

While it is certainly unusual for a court to consider duration before amount — as long as amount and duration are ultimately both considered as part of the "support package" — it is not an error to consider duration first: *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.); *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.); *Domirti v. Domirti*, 2010 CarswellBC 2864 (C.A.). (But using one part of the SSAG formula without the other undermines the overall integrity and coherence of the SSAGs.)

It is unclear why, having found that the Wife was entitled to spousal support, Justice MacPhail departed from the suggested duration of spousal support under the SSAGs, which, in this case, would have resulted in indefinite spousal support as the Wife met the "Rule of 65" (the Wife was around 45 at the time of separation and the parties were married for close to 22 years). [See *Climans v. Latner* (2020), 45 R.F.L. (8th) 283 (Ont. C.A.) at para. 3; *Djekic v. Zai* (2015), 54 R.F.L. (7th) 1 (Ont. C.A.), at para. 9.] Her Honour seems to base her decision on the duration of the parties' relationship and their respective incomes and income earning capacities, but does not explicitly set out why these factors favour a duration that is significantly lower than what is prescribed by the SSAGs.

In any case, after finding that the Wife is entitled to spousal support for seven years — the Court then ordered the Husband to pay the Wife **lump sum** spousal support of **$500,000**:

> [277] Given the duration of the parties' relationship, their respective incomes and income earning capacities, and the negative impact of the end of the relationship on the [Wife], I order that the [Husband] pay spousal support for a seven-year period from 2016 through to and including the end of 2022, a period of seven years or approximately one-third of the time they cohabitated during their marriage.
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> [278] In the unique circumstances of this case, I am ordering that the [Husband] pay a lump sum spousal support to the [Wife] in the amount of $500,000, for support for the years in question.

Justice MacPhail acknowledged that, despite that s. 15.2(1) of the *Divorce Act* permits lump sum support orders, such orders are generally the "exception" rather than the "rule". She, correctly, cites the factors to be considered in awarding lump sum support by the Ontario Court of Appeal in *Davis v. Crawford* (2011), 95 R.F.L. (6th) 257 (Ont. C.A.):

> [67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to terminating ongoing contact or ties between the spouses for any number of reasons . . . and satisfying immediately an award of retroactive spousal support.

Ultimately, Justice MacPhail found that a lump sum order was appropriate because of the length of time the parties had been separated (almost eight years by the time the decision was released), and their extensive litigation history (in addition to a trial, the parties arbitrated issues arising under their Separation Agreement).

And while an award of lump sum support is no longer considered "exceptional" (*Davis v. Crawford* (2011), 95 R.F.L. (6th) 257 (Ont. C.A.)), such awards do continue to be the exception. Of course, one of the dangers of a lump sum award is the requirement to engage in some degree of crystal-ball gazing. Once a lump sum is awarded, the payor cannot get their money back. However, that said, it does seem that (upon meeting the appropriate test) a recipient *may* be able to vary a lump sum award: *Vance v. Vance* (1974), 13 R.F.L. 386 (Ont. C.A.); *Hayre v. Hayre*, 1978 CarswellBC 170 (C.A.); *Korn v. Korn* (2016), 76 R.F.L. (7th) 205 (Ont. S.C.J.); *Unterschultz v. Clark* (2022), 79 R.F.L. (8th) 261 (Alta. C.A.).

To the extent a recipient might be able to vary a lump sum award but a payor cannot, an award of lump sum spousal support can be seen as a bit lopsided — all the more reason a court must very seriously consider the facts before awarding lump sum support.

Taking all of this into account, we note that because the support award was specifically made payable on account of the years 2016 to 2022 — this was not really an award of "lump sum spousal support." Rather, this was a retroactive award. Therefore, all the discussion about lump sum support was likely unnecessary.

We are also not entirely clear as to how the Court calculated the lump sum of $500,000. Her Honour does not make any express findings as to the parties' incomes in the years after separation, apart from calculating the Husband and Wife's billings and other revenues earned through their medical practices. The Wife submitted SSAG calculations using an average annual income for her of $328,000 and $831,000 for the Husband. This produced a range of support of $13,289 (low); $16,134 (mid); and

$18,429 (high), which sums would leave the Wife with 43%-47% of the parties' net disposable income. But these figures were not accepted by Justice MacPhail. The only indication as to how her Honour calculated the lump sum is:

> [285] . . . I have also taken into account the fact that the $500,000 lump sum spousal support order I have made is roughly equivalent to payment of $1 million dollars in periodic spousal support by the [Husband] to the [Wife], which, over the course of seven years roughly corresponds to an average of $11,900 per month. As I have indicated, however, because of the greater income differences in the first years after the parties' separation, a greater proportion of the lump sum payment amount is attributable to those years, than to the last five years. I have also taken into account the fact that the respondent had and has the potential to earn significantly more that he did in the years preceding, and of, the trial of this action.

What we can glean from the decision is that the Court very much wanted a "clean break" for these parties given the eight years since separation and after a trial that spanned over $1\ ^1/_2$ years. They were also previously involved in an arbitration to resolve corporate issues relating to one of their jointly owned corporations.

Ultimately, Justice MacPhail did something rather clever. Having determined that some time-limited spousal support was warranted; and wanting to enable a clean-break by way of an order for lump sum support, but without the attendant risks given the facts of the case; and given that the parties had been separated for eight years at the time of trial; her Honour essentially awarded seven years of retroactive spousal support, thereby avoiding the common pitfalls of awarding prospective spousal support by way of lump sum. As we said: clever.

Justice MacPhail also found that the Husband had breached numerous provisions of their Separation Agreement, including trust obligations to provide information to the Wife about two patents owned by their jointly owned corporation. (He failed to keep the Wife informed about corporate litigation and the settlement received which funds were supposed to have been shared.) These breaches were found to be "egregious", and her Honour awarded the Wife $60,000 in damages — but notably without the Wife having to specifically prove the amount of any damages she suffered:

> [459] Given the [Husband's] actions and my findings that his actions were not justified, and considering that he breached his trust obligations and therefore his fiduciary obligations to Brain Matters Inc., a generous amount of general damages is appropriate to compensate the [Wife] for the consequences of those actions and to deter the [Husband] from taking such actions in the future.
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> [460] Taking the foregoing into account, I order the [Husband] to pay the sum of $60,000 in general damages to the [Wife].
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> [461] In closing, I note that the [Wife] did not claim punitive damages for the [Husband's] breaches of contract, damages available in certain breach of contract cases where a party has a fiduciary or other obligation.
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> . . . . .
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> [464] I am satisfied that the amount of general damages I have awarded is sufficient to deter the [Husband] from future breaches of the parties' Separation Agreement and his trust obligations thereunder.

And there you have it. High-income earners can get (retroactive) spousal support, too.

Correction: We have learned that a Canadian divorce was granted before the Iranian divorce. Therefore, while our comments about the Court's jurisdiction to order spousal support following a foreign divorce may be instructive, they are not relevant to this specific case.

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