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— Franks & Zalev - This Week in Family Law

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Contents

• If Harrison Ford Can Work into His 80s . . .

• What the Court can do at the End, the Court can do in the Middle

If Harrison Ford Can Work into His 80s . . .

Eldridge v. Eldridge, 2024 CarswellBC 131 (C.A.) — Newbury, Groberman, and Stromberg-Stein JJ.A.

This case started as most cases do — with the parties meeting on an archeological dig site in the late 1970s. If we had a dollar for every case that started that way . . . Anyway, the parties went on to work together, and they started an archeological consulting business in 1985.

The parties had four children, three of whom were independent, the last (and youngest) of whom had special needs.

The wife eventually got out of the "archaeology game" and focused on being the children's primary caregiver while Indiana Jones continued to work and grow the archeological consulting business.

The parties separated in 2010 when the wife was 54 and the husband was 57.

After extensive negotiations, and with the assistance of a mediator/arbitrator, the parties executed a Separation Agreement in September 2015. Under the terms of the Agreement the husband retained ownership of the consulting business, and the mother took sole title to the matrimonial home.

The husband was also required to pay spousal support in accordance with a formula: he was to pay $5,000 a month plus 30% of his income in excess of $120,000.

The Separation Agreement specified that spousal support was to be paid starting in September 2016 and continuing up to and including the husband's 65th birthday. The Agreement permitted either party to request a full *review* of spousal support (entitlement and amount) under specified circumstances, including when either party reached the age of 65, when either party ceased employment after the age of 65, or if there was a change in income of 20% (either up or down).

In July 2018, the husband moved to review the spousal support because he had reached 65 years of age. He also argued that he could review support because his income had increased by more than 20%. The husband argued that he intended to wind up the business in the near future; *but there was no concrete plans in that regard*.

The parties returned to their previous mediator/arbitrator. This time, the parties could not mediate their differences and the matter moved to arbitration. The arbitration began in January 2020 and ended in December 2020. At one point during the ongoing arbitration, there was an interim motion to reduce support.

The Arbitrator determined that the husband's spousal support obligation would gradually decline until it would end altogether in August 2025, when the husband would be 72 years old. The Arbitrator's justification was that the husband required "certainty" so that he could make decisions regarding the sale of the business. The Arbitrator set out that this would give "substance" to the parties' Agreement which intended for the husband to work past age 65 only on a "voluntary" basis. As part of the Award, the Arbitrator stated, "I anticipate that [the husband's] income will decline over the next five years and then any choice he makes to continue to work should be his to make without concern to his implication to spousal support."

The Arbitrator declined to award any support for the period between the start of the review (July 2018) and the date he set for the new declining support amounts (May 2021). The husband had been paying $11,580.40 a month, which was based on his income in 2018, but he did not increase it as would have been required under the terms of the Separation Agreement.

Although the wife had made no such claim, the Arbitrator also set out in his Award that the wife would have no claim to any of the future proceeds of the sale of the business.

The wife appealed to the B.C. Supreme Court.

The Chambers judge overturned the Arbitrator's decision. The judge determined that the Arbitrator had erred in law by terminating support prior to the husband's retirement and by basing the amount of support on a speculative assessment of the husband's future income. The Chambers judge ordered that the formula set out in the parties' Separation Agreement continue pending further court order or the agreement of the parties. The Chambers judge also ordered that the husband pay the wife the amount of spousal support owing to her under the Agreement for the period between the commencement of the review (July 2018) and her successful appeal.

Interestingly, the Chambers judge did not disturb the Arbitrator's decision that the wife would not share in the proceeds of the sale of the business in the future. The Arbitrator had the jurisdiction under the Separation Agreement to look at every aspect of the support regime and this gave certainty to both parties.

The husband then appealed the Chambers judge's decision to the Court of Appeal.

The first question to determine was the applicable standard of review in an appeal from a family law arbitration award under the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*") — presently not such an easy question to answer on the West Coast. As noted by the Chambers judge, this issue has now been "percolating" in B.C. courts for some time — the question being (at least in B.C.) whether *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 CarswellNat 7883 (S.C.C.) requires appellate or administrative law standards of review to be applied in a statutory appeal from an arbitration award (see *Nolin v. Ramirez* (2020), 47 R.F.L. (8th) 253 (B.C. C.A.) at paras. 30-37 for a full discussion of the issue).

Ultimately — and unfortunately — the Court of Appeal was of the view that, in this case, as appellate intervention was justified under *any* standard of review, it was not necessary to answer the question. Therefore, the question lives for another day. (See also *Mann v. Grewal*, 2023 CarswellBC 482 (C.A.) at paras. 36-37.)

By way of comparison, in Ontario, the question was answered quite some time ago, and it was determined that the decision of an arbitrator deserves as much deference on appeal as does a decision of a trial judge. Therefore, in Ontario, for an arbitral decision to be overturned on appeal, the appellate court must find that the reasons reveal an error of law or a palpable and overriding error with respect to factual findings: *Rosenberg v. Yanofsky*, 2019 CarswellOnt 19471 (S.C.J.); *Palmer v. Palmer* (2010), 87 R.F.L. (6th) 115 (Ont. S.C.J.) at paras. 3 and 5; *Reati v. Racz* (2016), 81 R.F.L. (7th) 166 (Ont. S.C.J.) at para. 28; *Gray v. Brusby* (2008), 56 R.F.L. (6th) 165 (Ont. S.C.J.) at para. 27.

In dismissing the husband's appeal, the Court of Appeal emphasized that this was a *de novo* review of support. Consequently, the decision-maker had to go back to consider the basic and fundamental principles of spousal support, including entitlement. And that is a good thing — at least for us — because it led to an *extensive* appellate summary of the fundamental principles

of spousal support, including a discussion of the differences between compensatory and non-compensatory support. While this summary does not break any new ground, it is a helpful restatement of well-settled law. It is worth a read.

The Court of Appeal agreed with the Chambers judge that a termination of support was not appropriate, on the basis of an event that could — *at some time* — happen in the future (the husband's winding down of the business and retirement). This was especially so given the lengthy relationship and the wife's strong entitlement to compensatory support. While the principles of certainty, autonomy and finality are certainly important, the Arbitrator had placed excessive weight on those factors — and the age of the payor — allowing them to swamp the basic principles of spousal support, including the factors and objectives of support in the *Divorce Act*.

This is clearly the correct result based on the current state of the law. A court should not determine support on the basis of speculative future events that may or may not amount to a material change. This principle goes back to *Messier c. Delage* (1983), 35 R.F.L. (2d) 337 (S.C.C.). See also *Dufresne v. Dufresne*, 2009 CarswellOnt 5617 (C.A.); *Rondeau v. Rondeau* (2011), 90 R.F.L. (6th) 328 (N.S. C.A.); *Armstrong v. Armstrong*, 1992 CarswellOnt 1470 (Prov. Div.); *Vaughan v. Vaughan* (2014), 44 R.F.L. (7th) 20 (N.B. C.A.); *Provoost v. Provoost* 2016 ONSC 1774; *Carey v. Carey* (2021), 59 R.F.L. (8th) 440 (B.C. S.C.) at para. 37; *A.E.E. v. M.T.E.* (2022), 77 R.F.L. (8th) 337 (B.C. S.C.); *Regisford v. Regisford*, 2017 CarswellOnt 1037 (S.C.J.) at para. 63; *Schmidt v. Schmidt* (1998), 36 R.F.L. (4th) 1 (B.C. C.A.) at paras. 25 and 44. These cases stand for the proposition that an order terminating support should only be made when the payor's "working life has clearly come to an end": *Renwick v. Renwick* (2007), 43 R.F.L. (6th) 286 (B.C. C.A.).

Two notable exceptions to this rule can be found in *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.) and *Caron v. Caron* (2023), 87 R.F.L. (8th) 1 (Alta. K.B.), where the Ontario Court of Appeal and Alberta Court of King's Bench allowed variation based on retirement being a *near certainty* in the short term, whereupon the payor's income would *definitely* decrease. So there is some "wiggle room" in the rule, but we would not recommend relying on the exceptions in any but the clearest of cases.

The Court of Appeal did disagree with the Chambers judge's decision on retroactive support. The Chambers judge did not consider whether the formulas set out in the Separation Agreement represented a fair amount of spousal support in the context of the review. Once the *de novo* review was triggered, it required a full and complete analysis as to what spousal support was payable. Absent some limiting conditions, in an agreement or order, a *de novo* review of support is just that — a *de novo* review — encompassing issues of entitlement, amount and duration: *Domirti v. Domirti*, 2010 CarswellBC 2864 (C.A.) at paras. 38-39; *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.) at para. 17; *M.T. v. J.S.* (2023), 86 R.F.L. (8th) 281 (B.C. C.A.).

According to the Court of Appeal, the Chambers judge should have either completed that analysis or remitted it back to the Arbitrator for determination, which is what the Court of Appeal did.

What the Court can do at the End, the Court can do in the Middle

Children's Aid Society of Toronto v. M.O., 2024 CarswellOnt 464 (C.J.) — Sherr J.

This is a case that is both important in terms of the jurisdiction of courts to determine "incidents of custody" and an example of intelligent pragmatic lawyers working with a judge to solve a problem for the benefit of a child.

The child in this case (C.O.) had been removed from his mother at birth by the Children's Aid Society (the "CAS"). There were concerns about the mother's mental health and the father did not present a plan to care for the child (he lived, and continues to live, outside of Canada). The CAS commenced a protection application and placed the child in the care and custody of the maternal aunt (the "Aunt") until July 21, 2020, when a final order was made placing the child in the care and control of the Aunt pursuant to s. 102(1) of the *Child Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 (the "*CYFSA*"). The final Order also provided the parents with parenting time at the discretion of the Aunt. Under the final Order the Aunt could obtain and/or renew government documentation for the child without the consent of any other party.

In February 2023, the Aunt contacted the CAS. She felt that there had been an error in the final order: the caregiver consent she had signed set out that she could travel with the child outside of Canada without the consent of the mother and father, but this term did not make its way into the final order. CAS advised the Aunt to bring a motion to change the final order in Family court, but this proved challenging for the Aunt, an unsophisticated litigant, who was struggling with the child who had been diagnosed with autism after the final order was made.

Fortunately, CAS was able to provide the Aunt with additional support and assistance in getting the child the help they needed (along with respite care for the Aunt).

CAS also brought a protection application on December 21, 2023, seeking an order placing the child in the care and supervision of the Aunt, subject to the supervision of the society for six months. The Aunt wanted to travel to Ghana with the child and CAS was supportive of this trip, stating that in their view it would be good "for the maternal aunt and for the child."

While everyone was supportive of the trip, the jurisdiction of the court to provide the relief sought by the Aunt was not clear. Under s. 102(a) of the *CYFSA*, a court can make any of the orders available to it under s. 28 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"), which reads:

> **Parenting orders and contact orders**
>
> 28 (1) The court to which an application is made under section 21,
>
> (a) may by order grant,
>
> (i) decision-making responsibility with respect to a child to one or more persons, in the case of an application under clause 21(1)(a) or subsection 21(2),
>
> (ii) parenting time with respect to a child to one or more parents of the child, in the case of an application under clause 21(1)(b), or
>
> (iii) contact with respect to a child to one or more persons other than a parent of the child, in the case of an application under subsection 21(3);
>
> (b) may by order determine any aspect of the incidents of the right to decision-making responsibility, parenting time or contact, as the case may be, with respect to a child; and
>
> (c) may make any additional order the court considers necessary and proper in the circumstances, . . .
>
> **Exception**
>
> (2) If an application is made under section 21 with respect to a child who is the subject of an order made under section 102 of the *Child, Youth and Family Services Act, 2017*, the court shall treat the application as if it were an application to vary an order made under this section.
>
> **Same**
>
> (3) If an order for access to a child was made under Part V of the *Child, Youth and Family Services Act, 2017* at the same time as an order for custody of the child was made under section 102 of that *Act*, the court shall treat an application under section 21 of this *Act* relating to parenting time or contact with respect to the child as if it were an application to vary an order made under this section.
>
> **Allocation of decision-making responsibility**
>
> (4) The court may allocate decision-making responsibility with respect to a child, or any aspect of it, to one or more persons.

Allocation of parenting time

(5) The court may allocate parenting time with respect to a child by way of a schedule.

Parenting time, day-to-day decisions

(6) Unless the court orders otherwise, a person to whom the court allocates parenting time with respect to a child has exclusive authority during that time to make day-to-day decisions affecting the child.

Parenting plan

(7) The court shall include in a parenting order or contact order any written parenting plan submitted by the parties that contains the elements relating to decision-making responsibility, parenting time or contact to which the parties agree, subject to any changes the court may specify if it considers it to be in the best interests of the child to do so.

Right to ask for and receive information

(8) Unless a court orders otherwise, a person to whom decision-making responsibility or parenting time has been granted with respect to a child under a parenting order is entitled to ask for and, subject to any applicable laws, receive information about the child's well-being, including in relation to the child's health and education, from,

(a) any other person to whom decision-making responsibility or parenting time has been granted with respect to the child under a parenting order; and

(b) any other person who is likely to have such information.

Among these potential orders are those dealing with the incidents of decision-making responsibility (it really was easier to write about "custody"). In the case of *CCAS of Hamilton v. V. A, N. E. and M. E.* (2022), 78 R.F.L. (8th) 116 (Ont. S.C.J.) the court set out "incidents of custody" that a court can order when making a s. 102 order as follows:

a. Decision-making responsibility;

b. Time-sharing — regular and holiday schedules;

c. Contact with persons other than a parent;

d. Communication between parties;

e. Prohibitions on changing a child's residence; and

f. Any other order the court considers necessary.

The question for Justice Sherr was whether the court could award similar "incidents of custody" when making a *temporary* care and custody order (as it was being asked to do in this case) rather than a final order. CAS argued that the court had jurisdiction pursuant to s. 94(2)(b) of the *CYFSA*:

Custody during adjournment

94(2) Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,

(a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;

> (b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate.

Subsection 94(6) of the *CYFSA* sets out the terms and conditions that can be made in an order under s. 94(2):

> **Terms and conditions in order**
>
> 94(6) A temporary order for care and custody of a child under clause (2) (b) or (c) may impose,
>
> (a) reasonable terms and conditions relating to the child's care and supervision;
>
> (b) reasonable terms and conditions on the child's parent, the person who will have care and custody of the child under the order, the child and any other person, other than a foster parent, who is putting forward a plan or who would participate in a plan for care and custody of or access to the child; and
>
> (c) reasonable terms and conditions on the society that will supervise the placement, but shall not require the society to provide financial assistance or to purchase any goods or services.

While the term "incidents of custody" or "incidents of decision-making responsibility" was not used, the court determined that the term "custody" *includes* incidents of custody, including the ability to obtain government documents for a child and to travel internationally. This gave the court the jurisdiction to allow the Aunt to take the child on the proposed trip to Ghana, as it determined that the trip would be in the child's best interests.

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