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— Franks & Zalev - This Week in Family Law

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We *Foresee* Some Issues Here

Clarke v. Clarke, 2023 CarswellBC 3829 (S.C.) — Weatherill J.

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When determining whether there has been a material change in circumstances, courts are supposed to consider what was *actually contemplated* at the time of the original order. Whether a particular change was "foreseeable" at the time of the original order is supposed to be irrelevant; after all — at some level, aside from Martians landing, everything is *foreseeable*. In *Walts v. Walts* (2016), 84 R.F.L. (7th) 441 (Ont. S.C.J.), the court correctly notes that, with respect to variation proceedings, the idea of "foreseeable" is improperly lifted from *Miglin*-type cases.

The difference between "foreseen" and "foreseeable" is discussed in *Hickey v. Princ* (2014), 50 R.F.L. (7th) 138 (Ont. S.C.J.), rev'd (2015), 69 R.F.L. (7th) 312 (Ont. Div. Ct.); *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (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.); and *Droit de la famille - 141364*, 2014 CarswellQue 5386 (C.A. Que.). And the Supreme Court lends a clarifying hand in *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.), in confirming that the test is whether the situation now relied upon as constituting a material change was reasonably with the contemplation at the time.

Nevertheless, as illustrated by the *Clarke* case, the idea of foreseeability continues to mistakenly find its way into the material change analysis.

The parties in *Clarke* married in 1988, and separated in 2010 after almost 22 years of marriage. They had two children together, who were 28 and 24, respectively, by the time of the application before Justice Weatherill in 2023.

The wife was only 40 years old when the parties separated. However, she suffered from a chronic pain condition (fibromyalgia) that prevented her from working and which had kept her out of the work force and in receipt of disability benefits from the Canada Pension Plan since at least 1993.

In 2013, Justice Davies made a final order that provided, among other things, that the husband would pay the wife $2,300 a month in spousal support (duration unspecified), and $1,785 a month in Table child support based on the husband's income of $124,000 a year, and the wife's CPP disability benefits of approximately $9,000 a year. Although Justice Davies' reasons did not explain how the court arrived at the figure of $2,300 a month in spousal support, some DivorceMate reverse-engineering made it clear that this amount was based on the mid-range of the "with child" formula of the SSAGs.

Child support ended for the parties' eldest child in 2014, and for the youngest child in 2019. The wife asked the husband to increase his spousal support payments when child support ended, but he refused.

In 2020, the wife commenced an application for increased spousal support based on alleged changes in her medical condition and on the basis that the husband's income had increased from $124,000 a year to $137,000 a year.

However, it does not appear that the wife argued that the end of the husband's child support obligations constituted a material change in circumstances. This was likely a strategic error on the wife's part because, as we discussed in the August 7, 2023 (2023-30) edition of *TWFL*, except in cases involving support payors with very high incomes, the end of child support payments almost invariably constitutes a material change in circumstances as a result of s. 15.3(3) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), which provides as follows:

> 15.3(3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

The wife's 2020 application was dismissed because, in addition to not raising the s. 15.3(3) argument, the wife did not adduce any medical evidence to prove that her health had deteriorated further, and the court was not satisfied that the $13,000 a year increase in the husband's income — an increase of 10.5% — was sufficient to constitute a material change.

Several years later, the wife commenced another variation application. This time, she raised the argument that the end of child support constituted a material change that justified an increase in spousal support. Furthermore, since the husband's income by that point had increased to $165,000 a year (i.e. an increase of 33% from the amount used in the 2013 order), the wife argued that the increase in the husband's income was now sufficient to constitute a material change.

[As an aside, given that the wife could have raised the s. 15.3(3) argument in the first variation proceeding, we wonder if the husband would have been successful had he tried to argue that the wife's request to vary spousal support on that basis was *res judicata* on the basis of issue estoppel. For further discussion of *res judicata* in the family law context, see our comment on *Murray v. Harrison*, 2023 CarswellBC 3389 (S.C.) in the March 18, 2024 (2024-11) edition of *TWFL*. The husband also could have argued that, in raising the issue now, the wife was improperly litigating "by instalment": *Cunningham v. Moran* (2010), 89 R.F.L. (6th) 421 (Ont. S.C.J.), aff'd (2011), 2 R.F.L. (7th) 1 (Ont. C.A.); *Strand v. Gilewich* (2007), 37 R.F.L. (6th) 182 (Sask. Q.B.); *Rowell v. Manitoba*, 2006 CarswellMan 30 (C.A.).]

Justice Weatherill agreed with the wife that "the cessation of child support obligations constitutes a material change in circumstances." He also agreed that this change warranted recalculating spousal support based on the "without child" formula, which resulted in a range of spousal support of $3,158 (low SSAG) to $4,211 (high SSAG) a month based on the husband's income at the time of the original order in 2013.

However, Justice Weatherill rejected the wife's argument that the increase in the husband's income from $124,000 a year in 2013 to $165,000 in 2023 was also a material change, because this level of increase would have been "foreseeable" at the time of the original order:

> [25] The [husband] has been working for the same employer for nearly 30 years. **I conclude that at the time of the Final Order, both parties would have anticipated his income to increase over the years.** It has now been some ten years since the Final Order was made and the [husband's] income has gone up roughly $40,000 over that time frame, for an average annual increase of $4,000 or slightly over 3% per year. **This, in my view, would not have been unexpected and does not constitute a material change in circumstances**. I am not persuaded that the annual increases in the [husband's] income to its present level would have resulted in the Final Order having different terms.[**emphasis** added]

Accordingly, Justice Weatherill determined that the husband's increased income was irrelevant to the issues before the court, and found that any variation in support should only be based on the husband's 2013 income of $124,000 a year. Furthermore, as the wife had not adduced adequate medical evidence about her condition and ability to work, his Honour found that it would appropriate to award the wife spousal support based on the low range of the SSAGs, which amounted to $3,200 a month.

Respectfully, we do not agree with the court's conclusion that the 33% increase in the husband's income (from $124,000 a year to $165,000 a year) was not a material change because the "parties would have anticipated [the husband's] income to increase over the years." The effect of this is that future increases in income cannot be a material change. While that would undoubtedly make exactly 50% of the separated population *very* happy — it just ain't right.

Whether the parties would have anticipated the husband's income increasing — or to put it slightly differently, whether the husband's increased income was foreseeable — should have been irrelevant to the question of whether there had been a material change. All that ought to have mattered was whether the parties and/or the court actually contemplated such an increase at the time of the original order, and whether the change was one that "if known at the time [of the original order] would have likely resulted in different terms": *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.) at para. 32. As Professors Rollie Thompson and Carol Rogerson explained in s. 13(a) of the SSAG's Revised User's Guide,

> **The test for a "material change", as confirmed by the Supreme Court of Canada in *L.M.P. v. L.S.*, 2011 SCC 64, is a change that is substantial, continuing and that "if known at the time, would likely have resulted in a different order".** *L.M.P.* is now the leading case on the threshold test for variation. **The test is not whether the change was or was not "foreseeable" by the parties at the time of the previous order. The language of "foreseeability" is mistakenly transposed by lawyers and judges from the case law dealing with spousal support agreements** — first *Pelech* and now *Miglin*. Some prefer to restate the "material change" test as a change that was not "foreseen" in the initial order, but even this often leads to confusion. **The better approach is to focus on what was "contemplated" or "taken into account" in the initial order.** [emphasis added]

See also our comment on *Caron v. Caron* (2023), 87 R.F.L. (8th) 1 (Alta. K.B.) in the June 26, 2023 (2023-25) edition of *TWFL* for further discussion about this issue.

Given that the parties were married for almost 22 years and the wife had been the children's primary caregiver, it is difficult to contemplate a scenario where the 2013 spousal support order would not have been different had the husband been earning $165,000 a year at that time instead of $124,000 a year. Accordingly, the increase in the husband's income was clearly, to use the words of the Supreme Court in *L.M.P.*, "a change that would have likely resulted in different terms", and therefore sufficient to constitute a material change in circumstances.

That being said, the fact that the husband's increased income was (in our view at least), a material change in circumstances, does not mean that the wife was automatically entitled to receive spousal support based on the husband's current income. Rather, as the Supreme Court explained in *L.M.P.*, once a material change has been established, "the court then takes into account the material change, and should limit itself to making only the variation justified by that change." And, to make that determination in this case, the court would have had to consider the objectives set out in s. 17(7) of the *Divorce Act*, and whether the wife was entitled to share in the post-separation increase in the husband's income. For a thorough discussion of the factors that apply when dealing with spousal support and post-separation increases in income, see Justice Chappel's decision in *Thompson v. Thompson*, 2013 CarswellOnt 12392 (S.C.J.) at para. 103, where her Honour summarized the factors that apply in these cases, and her decision in *Kinsella v. Mills* (2020), 44 R.F.L. (8th) 1 (Ont. S.C.J.) at para. 431, where her Honour provided an updated list of factors.

Excuse Me; There's Some Child Support Irony Stuck in My Throat

Brun v. Fernandez (2023), 94 R.F.L. (8th) 141 (Ont. S.C.J.) — Jain J.

Issues: Ontario — Child Support — Variation — Adult Child

Brun v. Fernandez provides a thorough summary of the law addressing when child support should end for a child over the age of majority — commonly referred to as the oxymoronic "adult child".

The parties were married in 1996 and separated in 2006. They had two children together, who were born in 1997 and 1999 respectively.

After they separated, the parties signed a Separation Agreement that required the father to pay the mother $400 a month in child support based on an income of $27,100 a year.

Although the Separation Agreement only required the father to pay minimal support, he still failed to comply with his obligation, and by 2014 his arrears had grown to $26,000, which was equivalent to almost ***five and a half years*** of support based on the $400 a month he had agreed to pay. When the Family Responsibility Office finally started taking more aggressive steps to collect the arrears, the father responded by commencing a Motion to Change looking to rescind the arrears, and to reduce his ongoing support payments. (The FRO seems to have that effect on people.)

In 2016, the parties settled the father's Motion to Change by way of a consent order that reduced the arrears to $20,000, and which required the father to pay them at a rate of $150 a month. The final order also reduced the father's child support payments from $400 a month to $350 a month based on an imputed income of $23,000.

The parties' older child finished university in January 2020. Their younger child finished high school in June 2017, and did not pursue further education.

After the older child finished university, the father commenced a further Motion to Change, and asked the court to terminate his support obligations retroactive to June 2017 for the younger child, and to January 2020 for the older child.

The mother agreed that the support payments should end, but she argued that the appropriate termination date was November 2020 because:

> a. although the older child had graduated university in January 2020, it had taken him until November 2020 to secure employment; and
>
> b. although the younger child finished school in June 2017, he had still been dependant on her until November 2020 for various reasons, including the emotional difficulties he experienced as a result of the divorce, and his unsuccessful attempts to complete various training programs.

Accordingly, Justice Jain had to determine when child support should end for each of the parties' children, which required her to consider the following provisions of the *Divorce Act*:

> 1. Subsection 15.1(1), which permits a court to make an initial order requiring a spouse to pay child support for a "child of the marriage";
>
> 2. Subsection 17(1), which permits a court to vary an order that was made pursuant to s. 15.1(1); and
>
> 3. Subsection 2(1), which defines a "child of the marriage" as "a child of two spouses or former spouses who, at the material time, (a) is under the age of majority and who has not withdrawn from their charge, or (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life[.]"

Based on these provisions, Justice Jain determined that to decide the case, she had to consider and answer the following two questions:

> [10] . . . (a) **Is the adult child able to withdraw from their parents charge or obtain the necessities of life**, i.e., the court must make a finding of whether the adult child can or cannot obtain an income to meet their reasonable needs; and

(b) **Is the "cause" of the inability to withdraw permitted under the *Divorce Act***, i.e., is the cause of that inability a social/economic factor (such as the cost of living and delayed adulthood, or a difficult transition in their life). [emphasis added]

Her Honour also determined that the onus of proof fell on the mother, as she was the parent claiming that child support should continue, and she then proceeded to review the leading authorities about whether and when a child over the age of majority will still be entitled to child support, including the following:

Question One: Is the adult child able to withdraw from their parents' charge or obtain the necessities of life

• "The first part of the analysis in determining child support entitlement for adult children requires the court to ascertain whether the child is in fact still under parental charge. The analysis of this issue focuses in part on whether the child remains financially dependent on the parent[.]" [*Weber v. Weber* (2020), 45 R.F.L. (8th) 196 (Ont. S.C.J.) at para. 57]

• "In assessing whether an adult child is 'unable to obtain the necessaries of life' within the definition of 'child of the marriage,' the question is not whether their sources of income and other financial assistance support a sustenance existence, but rather whether they are sufficient to support the child's reasonable needs having regard for the condition, means, needs and other circumstances of the child, and the financial ability of each parent to contribute to the child's support[.]" [*Weber v. Weber* (2020), 45 R.F.L. (8th) 196 (Ont. S.C.J.) at para. 58]

• The court must consider whether the adult child's sources of income are sufficient to meet their reasonable needs, bearing in mind that "the lifestyle of children should suffer as little as possible as a consequence of their parents separating", and that "[i]f the parents would have paid the educational expenses of the children had they not separated, then, all things being equal, the children should be entitled to expect they would pay them even though the parents have separated." [*Lewi v. Lewi* (2006), 28 R.F.L. (6th) 250 (Ont. C.A.) at para. 171]

• "Claims for support for adult children who are able to work, but unemployed, have been granted, though generally the courts will limit the duration of support in these cases[.]" [*Phillip v. Phillip (Kreger)*, 1989 CarswellSask 374 (Q.B.) at para. 16; *Weir v. Weir* (1986), 1 R.F.L. (3d) 438 (B.C. S.C.) at paras. 12-13; and *Bruehler v. Bruehler* (1985), 49 R.F.L. (2d) 44 (B.C. C.A.), at para. 3]

Question Two: Is the "cause" of the inability to withdraw permitted under the Divorce Act

• If a child is under parental charge and unable to withdraw from it or obtain the necessaries of life, the court must determine whether the inability is due to illness, disability, or other cause. When considering this question, the term "other cause" should be "interpreted broadly". [*Weber v. Weber* (2020), 45 R.F.L. (8th) 196 (Ont. S.C.J.) at para. 59; and *KMR v. IWR*, 2020 CarswellAlta 242 (Q.B.) at para. 38]

• The term "other cause" can include "a reasonable transition period" after a child completed his or her studies "to seek out and obtain employment." [*Weber v. Weber* (2020), 45 R.F.L. (8th) 196 (Ont. S.C.J.) at para. 62; *Jefic v. Jefic (Grujicic)* (2022), 83 R.F.L. (8th) 372 (Ont. S.C.J.) at para. 68; and *A.E v. A.E.*, 2021 CarswellOnt 18880 (Ont. S.C.J.) at para. 189]

After discussing the applicable legal principles, Justice Jain turned her attention to the particular facts of this case. There was certainly an argument to be made that child support should end earlier than November 2020, particularly for the younger child who had been out of school since June 2017. However, in this case, Justice Jain was satisfied that the father's non-compliance with the parties' original agreement and his own failure to earn or pay support on more than minimum wage for many years were far more important considerations. As she explained in her decision:

[30] . . . The [father] did not see the irony in the fact that he expected his [younger son] to become completely independent as soon as he turned eighteen and graduated high school, while he, at the age of forty-eight was not even working full-time or supporting himself without help from family and friends. He did not have any insight or compassion to extend support for [the older son] because it took [him] almost one year after graduation to find a full-time job. In my view, by

> 2017, the [father] had gotten away with being very irresponsible for his children for many years, and he had a very poor work ethic. For most of the children's childhood, the [father] failed to obtain and/or maintain full-time employment. Then, not long after both children were eighteen years old, he suddenly (and conveniently) was able to obtain and hold a full-time job that pays more than minimum wage.

Accordingly, Justice Jain rejected the father's request to terminate child support for the older child as soon as he finished school in January 2020, and the younger child as soon as he finished school in June 2017, and instead granted the mother's request to find that both children were still entitled to child support until November 2020. In choosing this date, she also took into account the difficulties created by the start of the COVID-19 pandemic in March 2020, particularly its impact on the children's ability to find employment and support themselves.

After determining that both children were entitled to child support until November 2020, Justice Jain reviewed the father's income since 2016 and the mother's claim for s. 7 expenses. In doing so, her Honour concluded that the father had underpaid child support by just over $21,000, and she ordered him to pay that amount to the mother, together with any remaining arrears he still owed pursuant to the 2016 order, at a rate of $500 a month.

Given the father's behaviour, this result is not particularly surprising. That being said, we would suggest that the order for the younger child, which required the father to pay support for him from June 2017 to November 2020 (i.e. $3\ ^{1}/_{2}$ years) even though he was not in school — and in the absence of any objective evidence (medical or otherwise) — is not something that should be done as a matter of course. Absent exceptional circumstances, a parent simply does not have a legal obligation to support an adult child who has been out of school for years and does not have an illness or disability that prevents him or her from becoming gainfully employed. However, the result is wholly unsurprising given the father's conduct.

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