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— Franks & Zalev - This Week in Family Law

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When Does a Reasonable Objective Become an Objective Duty?

***White v. White* (2024), 2 R.F.L. (9th) 265 (Ont. C.A.) — Huscroft, Miller and Favreau JJ.A.**

Issues: Ontario — Spousal Support — Reduction in Support

In the trial below, the court significantly decreased Ms. White's entitlement to spousal support. At the appeal, she argued that the trial judge erred in imputing $35,000 of income to her and in refusing to impute income to Mr. White.

This is their story. Tum tum . . .

The parties separated on December 19, 2018, after an 18-year marriage. They had two daughters, born in 2004 and 2006.

On April 16, 2019, the parties entered into a separation agreement. The agreement provided that the children would live with Mr. White for most of the year and with Ms. White for the rest of the year. Neither party was to pay child support. Mr. White was to pay Ms. White $4,100 a month in spousal support, starting on May 1, 2019, for fourteen years and two months. However, Ms. White obligated herself to "make reasonable efforts to support herself", and Mr. White's obligation to pay spousal support would be reduced in proportion to Ms. White's income once she started earning more than $30,000 per year.

At the time of their separation agreement, Mr. White's annual income was $189,000. Ms. White had not worked outside the home since 2011.

The Separation Agreement also provided that spousal support could be changed "if there is a material change in circumstances, even if the change was foreseen or foreseeable," and the Agreement specified that possible material changes included changes to either party's financial position or to the child support arrangements.

Ms. White had originally anticipated that she would spend time in Mexico for the purpose of setting up a travel business. That, however, did not work out.

Between May and July 2020, Mr. White lost his job and stopped paying spousal support. Ms. White brought an application to enforce the Separation Agreement. In response, Mr. White sought to vary the Separation Agreement based on changes in circumstances.

By the time of the trial, there had been several arguable material changes in circumstances. In March 2020, the children started living full-time with Ms. White, but one of them moved back with Mr. White in 2021. After Mr. White lost his job, his income fluctuated as he went through different jobs. By the time of the trial, he expected to earn $80,000 annually. Ms. White found some temporary work in a gift shop during the summers of 2020 to 2023, but her income never exceeded $20,000 per year.

After a 3-day trial, the trial judge found that there had been a material change in circumstances given Mr. White's change in income and the change in the children's principal residence. This led to an order varying the parties' Separation Agreement in several respects, including requiring that Mr. White pay child support to Ms. White, and reducing Ms. White's entitlement to spousal support.

In considering child support and spousal support, the trial judge considered whether to impute income to both parties. He attributed $35,000 of income to Ms. White:

> [Ms. White] is capable of work. She should be working year-round, not just summers. By May of 2020 she should have been able to earn $35,000 a year. I think that she has deliberately kept her annual income below $30,000 because of the provision in the agreement for reduction of spousal support in that event. I impute $35,000 to her, which I consider modest in the circumstances.

However, sauce for the goose is not always sauce for the gander — the trial judge did not impute any income to Mr. White above the $80,000 per year that he expected to earn in 2023. The trial judge accepted Mr. White's evidence that he did not deliberately lose his job. Rather, the trial judge accepted that Mr. White had trouble performing his work (as a salesman) because he was depressed. Not only did the trial judge have evidence in this regard from Mr. White's previous employer, but this finding was also based on the fact that Mr. White found two other jobs after losing his original job, and that he ultimately returned to work for his original employer.

On appeal, Ms. White argued that the trial judge erred in imputing income to her and in not imputing income to Mr. White.

The Court of Appeal started with a good summary statement as to the deference owed to trial judge's findings of fact and mixed fact and law:

> [14] This court owes substantial deference to the trial judge's findings of fact and mixed fact and law. The court will interfere "only where the fact-related aspects of the judge's decision in a family law case exceeds a generous ambit within which reasonable disagreement is possible and is plainly wrong": *Johanson v. Hinde*, 2016 ONCA 430, at para. 1; see also *Rados v. Rados*, 2019 ONCA 627, 30 R.F.L. (8th) 374, at para. 23. In addition, the imputation of income for support purposes is a discretionary and fact-specific exercise: *Levin v. Levin*, 2020 ONCA 604, at para. 12; see also *Korman v. Korman*, 2015 ONCA 578, 126 O.R. (3d) 561.

The Court of Appeal also saw no error in the trial judge's decision to impute income to Ms. White. His decision was based on the terms of the Separation Agreement and the evidence of Ms. White's efforts to find employment following the separation. In their Separation Agreement, the parties explicitly (and specifically) agreed that Ms. White would make "reasonable efforts to support herself."

This, despite the caution from the Court of Appeal in *Lavie v. Lavie* (2018), 8 R.F.L. (8th) 14 (Ont. C.A.) that the court should be cautious in imputing income to only one party where both parties are arguably under-employed.

Although not specifically referenced by the Court of Appeal, while self-sufficiency is generally considered an "objective" of spousal support and not a "legal duty" [see *Tedham v. Tedham* (2005), 20 R.F.L. (6th) 217 (B.C. C.A.) at para. 33 and *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.)], the objective of self-sufficiency can become something akin to a "special duty" where a spouse specifically agrees to make "diligent and reasonable efforts in this regard": *Strecko v. Strecko* (2014), 44 R.F.L. (7th) 1 (N.S. C.A.). Essentially, the specific agreement serves to convert a statutory objective into a contractual duty.

While there was some evidence that Ms. White had some limitations in finding employment (level of education, lack of work experience and mental health issues), there was also evidence that she worked during the summers. Therefore, it was open to the trial judge to find that Ms. White had not made reasonable efforts to find employment as required by the Separation Agreement. (Notably, the trial judge only imputed income of $35,000 to Ms. White, which is equivalent to working full-time at minimum wage.)

A Disservice To Service

***De Guzman v. De Guzman* (2023), 96 R.F.L. (8th) 74 (Alta. K.B.) — Sidnell J.**

Issues: Alberta — Service Pursuant to the *Hague Convention*

Service of originating processes in foreign jurisdictions continues to confuse and confound family law lawyers and litigants alike. And the international treaty that is supposed to simplify and expedite this process — *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "*Hague Convention*") — is a confusing mishmash of legalese that is difficult for even experienced family law lawyers to follow and understand.

So what hope does a self-represented litigant have — even if just seeking a divorce from a spouse in a foreign jurisdiction? As illustrated by *De Guzman v. De Guzman*, the answer is, unfortunately, little to none.

The husband and wife in *De Guzman* were married in the Philippines in July 2005 and had two children together, who were born in 2006 and 2008 respectively. The parties separated in 2012. At some point after they separated, the husband moved to Canada, while the wife and children remained in the Philippines.

In October 2022, the husband commenced a proceeding in Alberta for a divorce pursuant to s. 3(1) of the *Divorce Act* on the basis that he had been resident in Alberta for at least one year prior to the commencement of the proceeding.

When the husband commenced the divorce proceeding, he knew that the children were living with the maternal grandmother in the Philippines. But he did not know the whereabouts of the wife. He brought a motion for substitutional service, and he swore a brief Affidavit attesting to the fact that he had asked the children and various unnamed relatives and common friends where the wife was living, but did not get a clear answer. According to the husband, one of the children told him the wife was still in Manila, but he did not know her address, and one of the unnamed common friends told him that she had moved to somewhere in the Middle East. Where in the World is Carmen Sandiego?

Based on the extremely limited information in his Affidavit, the husband claimed that he had "exerted **all** possible efforts" [emphasis added] to locate the wife without success, and that he had no other way to find out where she was living. The suggestion that the husband's attempts to locate the wife constituted "all" possible efforts to locate the wife brings to mind a memorable scene from an episode from Season 8 of the Simpsons called "Hurricane Neddy" where, in a flashback, a young and out-of-control Ned Flanders is shown destroying a psychologist's office, while his Beatnik parents plead, "You've gotta help us Doc, we've tried nothing and we're all out of ideas."

But we digress.

As the husband's first Affidavit was clearly inadequate, he tried to bolster it by filing a further Affidavit that included an email address that he claimed belonged to the wife and that he proposed to use to serve her. He also attached a message from Facebook Messenger from an unnamed "common friend" suggesting that the wife knew about the court proceeding.

Somehow, based on this extremely limited information, the court granted an Order for substituted served, authorizing the husband to serve the wife at her alleged email address.

The husband emailed the wife his materials at her alleged email address, and then had her noted in default, and filed materials in support of his request for a divorce.

The request for a divorce came on before Justice Sidnell, who immediately recognized that the husband had made some potentially serious procedural errors. The Philippines had signed the *Hague Convention* shortly before the husband had commenced the divorce proceeding, so it had to be followed. Article 1 of the *Hague Convention* provides the starting point for the court's analysis, as it states that the *Convention* applies unless the address of the person to be served was "not known". And, if the *Hague Convention* applied, the caselaw in Canada is clear that the service provisions of provincial Rules of Court

(substituted service or validating service, for example) ***cannot*** be used to circumvent the process set out in the *Convention*. For example, as the Alberta Court of Appeal explained in *Metcalfe Estate v. Yamaha Motor Powered Products Co Ltd.*, 2012 CarswellAlta 1756 (C.A.):

> [49] The purposes of the *Hague Convention* — as stated in the preamble — are firstly "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time," and secondly "to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure". For the second purpose, **the *Hague Convention* sets an international standard for service which eliminates the need to determine the service process for any particular dispute.**
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> [50] **Allowing courts to validate service which fails to comply with the international standard would undermine that purpose**, as the *Hague Convention* would no longer be a comprehensive authority for service abroad involving the signatories to that *Hague Convention*. . . . [emphasis added]

See also *Khan Resources Inc. v. Atomredmetzoloto JSC*, 2013 CarswellOnt 3539 (C.A.) and *Wang v. Lin* (2016), 80 R.F.L. (7th) 42 (Ont. Div. Ct.).

Justice Sidnell found that the husband had failed to prove that the wife's address was "not known". There was significant evidence to suggest it was highly likely that the wife was living in the Philippines, including that one of the children had told him that she was living in Manila. The husband had not made "reasonable diligent efforts to learn the address of the recipient," and could not get around the *Hague Convention* by being "wilfully blind to the obvious when submitting that the recipient's address is 'not known'." Or, as Justice MacEachern put it in *Petrovic v. Petrovic* (2019), 34 R.F.L. (8th) 239 (Ont. S.C.J.), "[a] party should not be permitted to avoid the application of the *Convention* by 'closing its eyes' to the obvious."

Furthermore, although Article 11 of the *Hague Convention* permits a Contracting State to agree to permit service without having to go through their Central Authority, there was no evidence before the court to establish that the method of service used by the husband (email) was permissible in the Philippines.

If those problems were not enough, even if email service was permissible, Alberta's Rules of Court required that service be effected by someone other than the plaintiff. As the husband himself had emailed the paperwork to the wife's alleged email address, service would not have been valid even if the *Hague Convention* had not applied and/or the Philippines permitted service by email.

Accordingly, Justice Sidnell directed the husband to re-serve the wife properly and in accordance with the *Hague Convention*. As the children were living with the maternal grandmother, and as the court had to satisfy itself that appropriate arrangements were in place for the support of the children before a divorce could be granted (*Divorce Act*, s.11(1)(b)), Justice Sidnell also directed the husband to serve the grandmother pursuant to the *Convention*.

We suspect that the husband is going to have enormous difficulty following what appear to be clear directions from the court. As we said at the start, while the *Hague Convention* is *supposed* to simplify and expedite the process of serving a foreign party with an originating process, it is, in practice, anything but "simple" — particularly in countries like the Philippines that objected to service by postal channels (e.g. the mail or courier) under Article 10 of the Convention (a list of countries that have objected to service by postal channels can be found on the *Hague Convention* Service Section's website: https://www.hcch.net/en/instruments/conventions/specialised-sections/service). And, even if you *can* successfully navigate the process, there is a good chance that when your materials arrive at the foreign jurisdiction's central authority, they will fall into a black hole from which even the likes of Albert Einstein could not free them.

So remember — if you are dealing with a case where you need to start a lawsuit against a party in a foreign jurisdiction, carefully consider ***at the outset*** how you can properly effect service, and whether you are stuck trying to effect service under the *Hague Convention.* You should also consider what options are available if your attempts to effect service under the *Hague Convention* fail or take an inordinate amount of time, including whether and when you might be able to rely on Article 15 of the *Convention*, which provides as follows:

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —
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> a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
>
> b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.
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> Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —
>
> a) the document was transmitted by one of the methods provided for in this Convention,
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> b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
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> c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.
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> Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Remember when we said at the outset that the *Hague Convention* is a confusing mishmash of legalese? Fortunately, at paras. 80 and 88 of *Wang v. Lin* (2016), 80 R.F.L. (7th) 42 (Ont. Div. Ct.), Ontario's Divisional Court explained Article 15 means that if the situation is urgent, a party may be able to seek interim relief before service has been effected, but otherwise has to wait until either service has been completed in the foreign jurisdiction, or that the following conditions have been met:

> a. The documents were transmitted to the foreign jurisdiction's central authority in accordance with the *Hague Convention*;
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> b. A period of time considered adequate by a judge in Canada, which cannot be less than six months, has elapsed since the document to be served was transmitted to the foreign jurisdiction; and
>
> c. No certificate of service has been received from the foreign jurisdiction even though "every reasonable effort has been made to obtain it" from the foreign jurisdiction.

For example, as Philip Epstein discussed in the January 7, 2019 (2019-01) edition of *TWFL*, in *Tiwari v. Tiwari* (2018), 17 R.F.L. (8th) 419 (Ont. S.C.J.), Justice Sanfilippo relied on Article 15 to permit the wife, who was in Ontario, to serve the husband in India by mail. See also *Xue v. Zheng* (2018), 8 R.F.L. (8th) 398 (Ont. S.C.J.). However, unlike in *De Guzman*, the wife in *Tiwari* followed the procedures set out in the *Hague Convention*, repeatedly followed up with India's Central Authority without receiving a response, and waited almost 9 months before asking permission from the court to serve the husband in this manner.

Exactly *why* we are all beholden to a Convention that was written before the internet, email, or personal computers is a mystery. But until legislatures allow a change to the *Rules*, beholden we shall be.

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