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— Franks & Zalev - This Week in Family Law

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Don't Always Rush to Section 18 . . . Give Section 16 a Spin

***Chandler v. Chandler*, 2024 CarswellBC 2719 (B.C. C.A.) — Butler, Newbury and Fenlon JJ.A.**

Issues: British Columbia — Support — Determination of Income

We are all familiar with s. 18 of the *Child Support Guidelines*, SOR/97-175 (the "*Guidelines*") — the statutory "corporate-veil-piercing" provision that allows the court to consider all or part of the income of a corporation of which a payor is a shareholder, officer or director to be part of the payor's income for support purposes. In *Chandler*, the British Columbia Court of Appeal reminds us that s. 18 includes a very important word: "may." A court *may* — *not must* — include all or part of a corporation's income in the income of a payor. Section 18 of the *Guidelines* does not mandate such a conclusion. It does not necessarily apply in all cases. Rather the court must *first* determine that the straight application of s. 16 of the *Guidelines* would not be the fairest determination of a spouse's income.

In *Chandler*, the Court of Appeal also reminds us that it is often an error to fix a spouse's income prospectively, based on a prior year tax return, rather than relying on ongoing financial disclosure and future consideration of s. 18.

Let's see how it all unfolds.

This appeal was the latest step in a long-standing and highly contentious family dispute that had left both parties in precarious financial positions. The Appellant/Father was appealing the decision below on four grounds: **First**, he argued that the Application judge erred in applying s. 16 of the *Guidelines*in establishing the Respondent/Wife's income instead of s. 18 of the *Guidelines*, since the Wife operated a physiotherapy business through a partnership and a personal services corporation. **Second**, he argued that it was an error to predetermine the Wife's income for 2023 onward as it should be determined based on her earnings established through annual financial disclosure. **Third**, he argued that the Application judge erred in (at least) implicitly finding that the Wife had complied with her statutory disclosure requirements pursuant to the *Guidelines*, despite the lack of information available for 2021. **Finally**, he argued that the Application judge erred in failing to use the most recent income available to determine the Wife's 2022 income.

The Court of Appeal did not disturb the Application judge's decision to fix the Wife's income for 2020, 2021, and 2022 pursuant to s. 16 of the *Guidelines*. However, the court agreed that the Application judge erred in predetermining the Wife's *prospective* income from 2023 and allowed the appeal on that limited basis.

The parties were married for 15 years and had two children together. The litigation history included a six-day trial on parenting issues in 2018; a three-day application to vary in 2019; a ten-day trial on property and support in 2020; a parenting motion

in 2023; and the current appeal resulting out of two competing review applications. (They were, as we call them, "frequent fliers.") Below, the Application judge made orders fixing the incomes of the parties for support purposes for 2020 to 2023, and for amounts payable by both parties for child support and by the Husband for spousal support.

At the time of the parties' trial before Justice Baker in 2020, the Wife was just starting to build her physiotherapy and occupational therapy business, through a partnership called Northern Therapy Services ("NTS"). The Wife had rapidly grown and developed the business since the trial in 2020, but argued that her income had decreased and that she had considerable expenses given she was obtaining further education while trying to support her business. The Application judge accepted this, concluding that the Wife's decision to pursue a post-secondary business administration degree was reasonable in light of her career objectives.

In 2020, the Wife incorporated a holding company called Jocelyn Chandler Physical Therapy Corporation ("JCPT") in order to receive income from NTS for the therapy services she was providing. Thereafter, distributions from NTS no longer went to her personally, but to JCPT. Accordingly, as of 2021, the Wife no longer reported professional and business income from NTS, but reported employment income. The Application judge rejected the Husband's argument that the assets shown in the financial statements for JCPT should be included in income, as there was no evidence suggesting that the value of the assets was income available for the Wife's personal use.

The Application judge accepted the Wife's evidence of her income, noting that she did not receive any dividend income and there was no discrepancy between the pre-tax corporate income of JCPT and the Wife's Line 150 income. The Application judge also accepted the Wife's estimate of her 2022 income based on the income information that was available up to November 2022. Accordingly, the trial judge fixed the Wife's income as follows:

- 2020: $104,367.23
- 2021: $98,765.26
- 2022: $95,000.00

On appeal, the Husband argued that the earnings of NTS and the pre-tax corporate income from JCPT should be included in the Wife's income for support purposes and that it was an error to rely on the Wife's Line 150 income pursuant to s. 16 of the *Guidelines*. But the Court of Appeal did not agree.

In fact, not only did the Court of Appeal firmly reject the Husband's submission, but it also disagreed that the decision below to rely on s. 16 of the *Guidelines* was reviewable on a standard of correctness. The court emphasized the highly deferential standard of review applicable to all of the errors alleged by the Husband, noting the high deference applicable to family law matters generally and particularly for support orders:

> [29] The standard of review in family law matters generally, and with regard to support orders specifically, is highly deferential. An appellate court should not intervene unless it finds a material error, a serious misapprehension of the evidence, or an error of law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 1999 CanLII 691 (SCC) at paras. 10-12; *Jean Louis v. Jean Louis*, 2020 BCCA 220 at para. 24.
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> [30] As explained by Justice Griffin in *Zilic v. Zilic*, 2021 BCCA 107, at paras. 29-36, **there are many reasons for the deferential standard of review in family law**. Not only does a trial judge have the benefit of hearing the parties directly, **family proceedings engage multiple issues that require the application of legal principles to the particular facts of the case**. A judge "**ought not to compartmentalize each issue or the evidence in a mechanical fashion" and must recognize that the conclusions reached on the various issues are intertwined**: *Zilic* at para. 34. As noted in *Jean Louis*, although with respect to property division, at para. 25, the deferential standard applies because **discretionary decisions are central to the task a judge has to perform in resolving family disputes.**
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> [31] **I would reject [the Husband's] submission that the judge's decision to use s. 16 of the *Guidelines* to establish [the Wife's] income for support purposes is reviewable on a standard of correctness, unlike other child and spousal**

> **support issues**. **The question involves the application of principles of law to findings of fact and is discretionary at its core.** This is evident from the statutory language. The starting point for determining income is "the sources of income set out under the heading 'Total income' in the T1 General form issued by the Canada Revenue Agency" as set out in s. 16 of the Guidelines. Sections 17 and 18 of the *Guidelines* ask "if the court is of the opinion" that determining income pursuant to s. 16 "would not be the fairest determination" or "does not fairly reflect" all the money available to a spouse for payment of support. And, s. 19 provides that a court "may impute such amount of income to a spouse as it considers appropriate". The application of the *Guidelines* to determine a spouse's income requires the court to exercise its discretion after finding the relevant facts. In short, a judge's conclusion that the application of s. 16 (or of ss. 17-19) results in a fair reflection of all of the money available for the payment of support is to be reviewed deferentially.
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> [32] Accordingly, all four grounds of appeal involve the judge's exercise of discretion in making support orders, and are subject to the deferential standard of review. [emphasis in original; **emphasis** added]

The Court of Appeal rejected the Husband's argument that the court below was "required" to apply s. 18 of the *Guidelines*. While the Court of Appeal recognized that the determination of the Wife's income was somewhat premature given that she had recently set up a new business structure (and did not have complete information at the time of the hearing), the court concluded that they would not disturb the decision of the Application judge to fix the Wife's income for 2020, 2021, and 2022 based on the evidence before her and the corresponding support payable.

Section 16 is the starting position to determine a spouse's annual income for support purposes:

> 16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency . . .

However, pursuant to s. 17, if a court is of the opinion that the application of s. 16 would not result in the "fairest determination" of income, the court may determine an amount of income that is "fair and reasonable", considering patterns of income and non-recurring income.

Then, we get to s. 18:

> Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include:
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> (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
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> (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Having reviewed the *Guidelines* and authority on the issue, the Court of Appeal outlined:

> [45] . . . The fact that a payor receives income through a corporation that they control **does not, *by itself,* mean that the payor's *Guilelines* income is to be determined through the application of s. 18(1)(a), *let alone* that all of the pre-tax income of the corporation should be considered income available for support purposes**. A court must first decide whether application of s. 16 (the use of line 150 of the T1 General form) "would not be the fairest determination" of their income and whether it "fairly reflects all the money available" for the payment of support. As I have indicated, choosing the "measuring rod" which gives the most accurate measure of a payor's income is an exercise of discretion. [**emphasis** added]

In this case, the Application judge decided that the application of s. 16 did, in fact, produce the fairest determination of the Wife's income for support purposes and that her Line 150 income fairly reflected all of the money available to her for support purposes. The Husband also did not really argue for the application of s. 18, but focused more on imputation of income under s. 19.

Further, the court below had limited evidence before it and incomplete financial records regarding the Wife's new business structure. The dearth of an evidentiary record made a s. 18 analysis difficult, if not impossible, given that the Wife had made recent changes to her business structure, JCPT having only been in existence for less than two years, and there were only two incomplete financial statements. The financial record at the time of the hearing was for only nine months of 2021 and was not done for 2022. Nevertheless, the Application judge found the Wife's evidence credible and accepted it. Based on the evidence before her, the Application judge's decision to rely on s. 16 was reasonable in the circumstances and entitled to deference.

However, the Court of Appeal agreed with the Husband that the Application judge erred in determining the Wife's future income as established by the prior year's tax return and set aside this term of the Order. This conclusion relied on the assumption that a determination of the Wife's income pursuant to s. 16 will *always* be the most fair/reasonable representation of her income for support purposes, and there was no basis for that assumption. In the future, any one of ss. 17, 18 or 19 could apply to a determination of the Wife's income. Prospectively, the Wife's income should be freshly determined each year based on the financial information provided annually. In the future, an income analysis would require choosing "which measurement rod" should apply, ss. 16, 17 and/or 18.

The Court of Appeal rejected the Husband's further arguments; again reinforcing the difficult task the Application judge had, given the early stages of JCPT and the minimal financial information available. The evidence, albeit minimal, was sufficient, and it was open to the Application judge to accept the Wife's evidence, as she did. In any event, the Husband chose to proceed and did not seek to adjourn or ask the Application judge to make any orders regarding the Wife's disclosure.

Finally, the Court of Appeal suggests that there is "no legal principle" that requires the court to rely on the "most current information available". Here, we part company with the Court of Appeal. While the court must do its best to determine income on the evidence presented to them, there is absolutely a legal principle to suggest that the court should rely on the most current income available. In fact, we need look no further than s. 2(3) of the *Guidelines*:

> **Most current information**
>
> (3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

That certainly seems clear, don't it? If not, there's also *Lee v. Lee* (1998), 43 R.F.L. (4th) 339 (Nfld. C.A.); *L. (R.E.) v. L. (S.M.)* (2007), 40 R.F.L. (6th) 239 (Alta. C.A.); *MacDonald v. MacDonald*, 2009 CarswellNS 879 (S.C.), aff'd (2010), 83 R.F.L. (6th) 243 (N.S. C.A.); *Bell v. Bell* (1999), 1 R.F.L. (5th) 1 (B.C. C.A.); *Duffy v. Duffy* (2009), 73 R.F.L. (6th) 233 (N.L. C.A.); *Scott v. Scott* (2004), 10 R.F.L. (6th) 135 (N.B. C.A.); *Dillon v. Dillon*, 2005 CarswellNS 709 (C.A.); *Vanos v. Vanos* (2010), 94 R.F.L. (6th) 312 (Ont. C.A.); *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.); *Martens v. Martens*, 2016 CarswellAlta 642 (C.A.); and *R. (M.K.) c. R. (J.A.)* (2015), 74 R.F.L. (7th) 47 (N.B. C.A.); *White v. White* (2015), 62 R.F.L. (7th) 1 (N.S. C.A.).

Short, Sweet, Swift & Sure

***Pan v. Zhao*, 2024 CarswellOnt 15820 (S.C.J.) — Mathen J.**

Issues: Ontario — Remedy for Breach of Prior Court Order

There is nothing new or exciting about this case. But it is a refreshingly to-the-point application of Rule 1(8) of the Ontario *Family Law Rules*, O. Reg. 114/99.

The parties married in 1998 and separated in 2020. There are two adult children of the marriage.

The Respondent was given leave to bring an urgent motion to list and sell the matrimonial home ("Bennington") and another property ("Rockland"). Leave was granted by way of an over-the-counter motion (in Ontario this is known as a 14B motion) in writing to which the Applicant's counsel did not reply. The court was satisfied that the non-reply was on account of inadvertence.

The Applicant was living at Rockland with the two children. The Respondent was living in China.

By the time of the motion, the Respondent withdrew the request with respect to Rockland, in part because all mortgage arrears had been paid.

However, at the time of the motion, the Respondent had still yet to comply with several court orders, including:

(a) an order restraining the Respondent from continuing with a divorce proceeding in China;

(b) a costs order in the amount of $8750; and

(c) an order for the production of basic financial disclosure.

Given the Respondent's failure to comply with the outstanding order, Justice Mathen was simply not prepared to grant him any of the relief that he was claiming on his motion. Furthermore, she ordered that the Respondent could not ask the court for any further orders until he satisfied all outstanding court orders.

And that was it. No wavering back-and-forth. No "on this hand . . . but on the other hand." No pontification. No gnashing of teeth. Just simple cause and effect: if you do not obey court orders, you cannot ask for court orders. End of story; very refreshing.

Her Honour also accepted that under Rule 1(8), she could grant relief related to the Respondent's breach notwithstanding that such relief was not the specific subject of the motion; all she had to do was find that such relief was appropriate and consistent with the overall objective of the *Rules* to treat cases justly: *Hughes v. Hughes*, 2007 CarswellOnt 1977 (S.C.J.).

As the Applicant wanted to sell Bennington Heights as much as the Respondent did, and as the Applicant had provided a sworn affidavit from her real estate agent attesting to the difficulties encountered in dealing with the Respondent's realtor, the Applicant was given sole carriage of the sale so as to capitalize on the Fall market.

Given the lack of disclosure by the Respondent and the uncontested allegation that the Respondent had yet to pay any support, the court also agreed that $100,000 from the net proceeds of sale should be released to the Applicant.

More short and pithy decision like this with immediate consequences for breaching court orders — the fewer court orders will be breached. We guarantee it.

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