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Family Law Newsletters

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— **Franks & Zalev - This Week in Family Law**

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A Moderate Case of Entitlement — With Chronic Financial Symptoms: Take \$20,000 a Month for 12-Years

R.L. v. M.F. (2025), 19 R.F.L. (9th) 39 (Ont. C.A.) — Roberts, Miller, and Pomerance JJ.A.

It's been a while since an appellate court took a really deep dive into spousal support.

Few recent decisions have tackled entitlement and post-separation income sharing as thoroughly as *R.L. v. M.F.* In this high-income case, the Ontario Court of Appeal pulled together and clarified the key principles that govern entitlement, quantum, duration, and post-separation increases in income. For family law practitioners, it's both a helpful refresher and a practical roadmap for navigating support issues in complex, dual-career marriages.

It's also a reminder that spousal support cases are almost *always* won or lost at trial. Appeals on support are notoriously difficult. Even where the result might seem overly generous to some, an appellate court will not intervene if the trial judge applied the correct principles, considered the evidence, and made no palpable or overriding error. The fact that another judge might have reached a different, less generous, result on the same record is beside the point. That discretion lies at the heart of trial-level decision-making in spousal support cases.

Background

R.L. (the "father") and M.F. (the "mother") lived together for 14 years, raised two daughters, and built what the trial judge, Justice Kurz, described as a "somewhat traditional" high-income marriage: he was a banker earning over \$2 million annually; she was a respirologist working three days a week, earning about 60% (i.e. \$350,000) of the income of her full-time peers. She managed the home front; he climbed the corporate ladder; and both prospered.

The children were age 17 and 15 at the time of the trial — an important consideration for our support comment below.

Although the parties separated in 2020, they continued living under the same roof until late 2021, with the father covering the family's expenses until interim support was put in place.

The Trial

The trial focused primarily on parenting but also addressed significant financial issues, most notably spousal support.

On parenting, the central issue was whether the parties' two teenage daughters — who resisted overnights but continued daytime contact — should be compelled to stay overnight with their father.

The father alleged alienation, but Justice Kurz found the reality to be more nuanced: the mother's negative views had influenced the children, but she had not deliberately undermined their relationship with their father. The elder daughter, nearly 17, was free

to decide for herself, while the younger, almost 15, would continue regular day visits without overnights. The court maintained the existing schedule, emphasizing respect for the children's maturity and voluntary contact with both parents.

The support issues — which are of greatest interest for our purposes — were complicated. The father alleged that the mother was intentionally underemployed and should be imputed with a full-time income based on what she could earn working five days a week. He denied that she was entitled to spousal support at all. Even if entitlement existed, he argued that she should not share in his post-separation income growth, and that the amount and duration she requested were excessive.

The mother argued that her reduced hours, taken to care for the children, disadvantaged her while benefiting the father, whose long hours were possible because she shouldered most of the domestic responsibilities. Justice Kurz agreed — in part. He found that while her part-time schedule had supported the father's professional advancement, the mother was no less able to fully realize her earning potential than if she had worked full time throughout the marriage — and she had not suffered any ongoing disadvantage in her ability to earn income from her medical practice. As an OHIP-funded physician, she could earn a full-time income simply by increasing her workload, so her long-term earning potential remained intact. On that basis, he concluded she had a "moderate compensatory claim — one that is neither strong nor weak." Ah . . . mediocracy.

Income disparity alone does not create spousal support entitlement: *Farrar v. Farrar* (2003), 32 R.F.L. (5th) 35 (Ont. C.A.); *Lamothe v. Lamothe* (2006), 35 R.F.L. (6th) 148 (Ont. S.C.J.); *Osborne v. Wilfong* (2009), 66 R.F.L. (6th) 358 (Sask. Q.B.); *Metcalfe v. Metcalfe* (2013), 37 R.F.L. (7th) 471 (Alta. Q.B.); *Lee v. Lee* (2014), 52 R.F.L. (7th) 34 (B.C. C.A.); *Aquila v. Aquila* (2016), 76 R.F.L. (7th) 1 (Man. C.A.); *Blackstock v. Comeau* (2018), 4 R.F.L. (8th) 317 (Ont. S.C.J.); *Fielding v. Fielding*, 2014 CarswellOnt 4752 (S.C.J.); *Malone v. Cappon*, 2023 CarswellOnt 14692 (S.C.J.) at 21; *Choquette v. Choquette* (2019), 25 R.F.L. (8th) 150 (Ont. C.A.); *Ezurike v. Ezurike*, 2010 CarswellNS 242 (S.C.); *Dorey v. MacNutt*, 2013 CarswellNS 618 (S.C.). However, here, the 14-year marriage and the parties' financial interdependence supported a claim for non-compensatory support as well.

Having found the mother entitled to support, Justice Kurz held that her moderate compensatory claim justified allowing her to share in the father's post-separation income growth. After considering the SSAGs and the principles applicable in high-income cases, he ordered the father to pay \$20,000 a month in spousal support for nine years and eight months — from January 2023 to August 2032 — noting that this was "well above the Mother's needs", but "fairly compensates the Mother for the role she played in the marriage and the advantages that the Father accrued from that role," as well as "the non-compensatory aspects of the Mother's support claim."

While this equated to an NDI division of 56% for the mother, this amount was below the low end of the SSAG range on quantum (low-SSAG being \$25,298 per month, based on the father's income of just over \$2 million and the mother's imputed income of \$550,000), with the ordered duration falling within the guideline range of 7.25 to 14.5 years. However, when combined with interim support the father had paid since separation, the total support period amounted to just over 12 ¹/₂ years.

That is a whopping award in both quantum and duration in combination with a finding of no ongoing compensatory loss. While the amount is certainly on the high side, it is justifiable. But an additional nine-years and eight-months? That's just too long where there is no prospective compensatory loss — and where both children will have finished their undergraduate degrees in six years. And did we mention that this went hand-in-hand with a child support award of \$24,661 a month in Table support plus \$6,627 a month in s. 7 expenses?

In subsequent endorsements, Justice Kurz determined that no retroactive spousal support was owed, ordered the father to pay prejudgment interest on the \$475,000 equalization amount from the date of separation, and made no order as to costs, finding that neither party had a monopoly on success or reasonableness and that neither had beaten their offers.

The Appeal

The father appealed the decision on spousal support, arguing primarily that there could be no compensatory entitlement where the trial judge had found that the mother "suffered zero economic loss as a result of the roles assumed during the relationship"

and had imputed to her the substantial income she was capable of earning. He also argued that the trial judge erred by basing support on his post-separation income increases and that the award was both too high and too long.

At its core, the appeal asked a deceptively simple question: can there be compensatory support entitlement when the recipient has suffered no measurable career loss?

Issue One: Entitlement

In addressing entitlement, the Court of Appeal delivered a clear and comprehensive review of the governing principles. While many of these are well established, it is uncommon for an appellate court to gather and articulate them, and it has been some time since the issue of entitlement has been examined in this depth. The following summary does not include the case citations that are included in the court's decision, but includes paragraph references to the reasons for easy reference:

1. **No Presumptive Entitlement:** There is no automatic or presumptive right to spousal support; each claim must be established based on the evidence and statutory criteria. [para. 36]
2. **Multiple Factors:** When deciding spousal support, a judge must consider all factors listed in the *Divorce Act* — no single factor is determinative. [paras. 26 and 38]
3. **Income Disparity Not Enough:** A difference in income alone does not create entitlement to spousal support. [para. 36]
4. **Forms of Entitlement:** Spousal support may be compensatory (to address economic disadvantage or advantage) or non-compensatory (to meet needs and reflect means) (or both). [paras. 27-28]
5. **Distinction Between Compensatory and Non-Compensatory Support:** Non-compensatory support focuses on need and ability to pay, while compensatory support recognizes economic disadvantages suffered and advantages conferred as a result of the parties' roles. [paras. 27-28]
6. **Individualized and Discretionary:** The determination of spousal support is highly fact-specific and discretionary, depending on the circumstances of each marriage. [para. 29]
7. **Childcare And Domestic Work Have Substantial Economic Value:** The *Divorce Act* recognizes marriage as an economic partnership, where childcare and household management should not be viewed as having less economic value than paid employment. [para. 34]
8. **Multiple Bases of Entitlement:** Courts may rely on both compensatory and non-compensatory principles simultaneously; one does not exclude the other. [para. 32]
9. **Imputation Does Not Bar Entitlement:** The imputation of income to the recipient based on what they could earn does not preclude entitlement. [para. 30]
10. **Neither Does The Absence Of Career Setbacks:** The fact that a spouse has not experienced significant career setbacks or prejudice does not bar a claim for spousal support. [paras. 30, 35, and 37]
11. **Nor Does High Post-Separation Income:** The fact that a recipient continues to earn a good income after separation does not eliminate entitlement to support. In long marriages involving children, where one spouse supported the other's career, entitlement to support can exist even for a high-income recipient, recognizing the loss of marital standard of living and the partnership's economic consequences. [paras. 31, 37, and 42]
12. **Nor Does A Large Property Award:** A large property or equalization award may contribute to a fair distribution of resources but does not necessarily preclude entitlement to spousal support, since property division and support serve distinct purposes under the *Divorce Act*. [para. 40]

13. **Greater Entitlement in Longer Marriages:** The longer the marriage and the closer the economic union, the stronger the presumptive claim to equal standards of living after separation. [para. 34]

14. **Standard of Living Matters:** The merger of the parties' economic lifestyles during marriage creates a joint standard of living that must be considered in determining support. The recipient spouse is entitled to a degree of comfort beyond basic or subsistence needs, and spousal support must reflect the standard of living reasonably available to the parties following separation. [paras. 34 and 42]

15. **Fair and Equitable Distribution of Resources:** The overarching goal is to ensure a fair and equitable distribution of resources to alleviate the economic consequences of marriage or its breakdown. These consequences include not only economic disadvantages but also economic benefits. [para. 39]

Recognizing that spousal support determinations attract significant appellate deference, the court reiterated that entitlement, amount, and duration involve a discretionary balancing of factors by the trial judge. Absent a material error of law, misapprehension of evidence, or serious error in principle, an appellate court cannot intervene merely because it would have reached a different conclusion or weighed matters differently: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) at paras. 10 to 12; *Hendriks v. Hendriks* (2022), 71 R.F.L. (8th) 266 (Ont. C.A.) at paras. 17, 40; *Scheibler v. Scheibler* (2024), 100 R.F.L. (8th) 51 (Ont. C.A.) at para. 10.

This deference is even greater where payor income is over \$350,000, where the SSAGs themselves contemplate "pure discretion" as one possible approach: *Berta v. Berta* (2017), 1 R.F.L. (8th) 255 (Ont. C.A.) at para. 49.

In this case, the Court of Appeal found no error in the trial judge's conclusion that the mother had both moderate compensatory and non-compensatory entitlement to spousal support. It was satisfied that Justice Kurz had reached that conclusion after a thorough review of the evidence, the relevant provisions of the *Divorce Act*, and the governing jurisprudence, and that there was no basis for appellate intervention.

In our view, there was a fundamental flaw in the father's argument. On these facts, it was simply incorrect to assert that the mother had "suffered zero economic loss as a result of the roles assumed during the relationship." By taking two maternity leaves and working part-time for many years to care for the children and manage the home, the mother gave up the opportunity to work full-time and accumulate additional savings and investments. The precise value of that loss may be debatable — and some of it would have been reflected in equalization — but it was not zero. It may not have been easily measured. It may not have been huge. It may not have precisely mirrored the benefit enjoyed by the father. But it was not "zero."

Moreover, while the mother's compensatory claim was not remotely as strong as it would have been had she left medicine entirely, to suggest that she had no compensatory claim because she entered and left the marriage as a doctor is not correct. As discussed in "Remembering Moge" in the September 25, 2023 (2023-37) edition of *TWFL*, a claim for spousal support is not a claim in tort, and applying a strict "but for" causation test is inconsistent with compensatory support principles. The court's task is to focus on what actually occurred within the marriage — the roles assumed and their real economic consequences — not on hypothetical alternatives. "Once a doctor, always a doctor" is no more valid than "once a secretary always a secretary."

It is both impossible and irrelevant to know where the mother's career might have gone had the parties made different choices. Perhaps she would have ended up in the same position; perhaps not. But that is not the question the law requires the court to answer. Nor is it correct to equate Justice Kurz's finding that the mother "has not suffered an ongoing disadvantage in her ability to earn income from her medical practice" with a finding of "zero economic loss as a result of the roles assumed during the relationship." Those statements are not the same. However, it may be more clear to focus on the economic benefits enjoyed by the father rather than on the economic losses suffered by the mother, which are admittedly more difficult to understand.

This is not to say that the mother's significant earning potential was irrelevant — it plainly was. Her high professional income substantially reduced the mother's need for support, and the amount of the father's support obligation. Had her income been \$50,000 instead of \$550,000, the support order would almost certainly have been much, much higher.

But that goes more to quantum and duration than to entitlement. Once entitlement is established, the recipient's earning capacity becomes an important factor in determining how much support is appropriate and for how long, not whether support should be payable at all.

Issue Two: Post Separation Increases In Income

Much has already been written about how to deal with spousal support when a payor's income increases post-separation, including:

- The list of 13 factors set out by Justice Chappel in *Thompson v. Thompson*, 2013 CarswellOnt 12392 (S.C.J.) at para. 103, later expanded to a list of 15 factors in *Kinsella v. Mills* (2020), 44 R.F.L. (8th) 1 (Ont. S.C.J.) at para. 431.
- Rollie Thompson's articles "Post-Separation Increases in Payor Income and Spousal Support" and "It's Complicated: How Entitlement Winds Its Way In and Out of the SSAG", both of which are available on Westlaw (39 CFLQ 185 and 44 CFLQ 147).

While the 13 factors from *Thompson* (the case, not the Professor) have been cited with approval by several appellate courts, including the Ontario Court of Appeal in *Hersey v. Hersey* (2016), 87 R.F.L. (7th) 272 (Ont. C.A.), at para. 19, and the Saskatchewan Court of Appeal in *Kolodziejski v. Maximiuk*, 2023 CarswellSask 447 (C.A.), at para. 64, none had considered the updated list from *Kinsella v. Mills* or analyzed the issue in depth.

That changed with *R.L.*, where the Court of Appeal set out a detailed list of principles governing claims based on post-separation increases in income. While most draw from existing authorities, the court's consolidation of them into a single, practical framework is immensely useful. Again, we have not included the case citations, but have included paragraph numbers from the reasons so you can easily locate the references if needed:

1. **No Automatic Right to Share:** A recipient spouse is not automatically entitled to increased spousal support based on a payor's post-separation income growth. [para. 64]
2. **The Connection Test:** The key question is whether there is a link or connection between the marriage or cohabitation and the payor's post-separation increase in income. A link or connection is more likely where entitlement is compensatory, and less likely where it is purely non-compensatory. [para. 65]
3. **Compensatory Basis Strengthens Claim:** A compensatory basis for entitlement provides a stronger foundation for sharing post-separation income, since compensatory support recognizes both the economic advantages conferred on the payor and the payee's right to share in the fruits of the marital partnership that continued to generate benefits after separation. [para. 66]
4. **Proof of Contribution Required:** The recipient must demonstrate a contribution — direct or indirect — but need not establish a strict "causal connection" between their efforts and the payor's post-separation success. [para. 67]
5. **Framed by Statutory Objectives:** The determination of whether, and to what extent, post-separation income should be shared must occur within the overall objectives and factors of spousal support under the *Divorce Act*. [para. 68]
6. **Key Factors to Consider:** The analysis should take into account the length of the relationship, the nature and extent of the recipient's contributions and sacrifices during and after cohabitation, and the duration of those efforts. [para. 69]
7. **Contributions to Advancement:** The court examines whether the recipient's efforts contributed to the payor's financial advancement during or after the relationship, including the expertise and advantages the payor gained through the joint enterprise of the marriage. [para. 70]

8. **Impact of Sacrifices:** Where the recipient's sacrifices supported the payor's post-separation financial progress, this typically justifies sharing in the income increase — and potentially at a higher level. [para. 71]
9. **Forms of Contribution:** Contributions can take many forms, including assuming primary household management, taking on most childcare responsibilities, assisting in the payor's business, or subordinating one's career to allow the payor to build theirs. [para. 71]
10. **Continuing Childcare Matters:** Continued primary caregiving after separation supports a claim to share in post-separation income increases, as it allows the payor to continue focusing on their career. [para. 71]
11. **Skills Acquired During Marriage:** Evidence that the payor's post-separation success stems from knowledge, skills, or connections developed during the marriage supports sharing in that income growth. [para. 72]
12. **Temporal Connection:** The closer in time the income increase occurs to separation, the more likely the court will find a connection between the recipient's contributions and the payor's post-separation success. [para. 72]
13. **Post-Separation Career Changes:** Even if the payor changes jobs or positions post-separation, the court must still consider whether the advancement is attributable to expertise or opportunities developed during the marriage with the recipient's support. [para. 73]
14. **Not All or Nothing:** Sharing in post-separation income increases is not an all-or-nothing proposition - partial sharing may be achieved by locating the award at an appropriate point within the SSAG range to reflect the degree of connection between the marriage and the income increase. [para. 76]
15. **Traditional Marriages and Long Relationships:** Longer traditional marriages with children — where the spouses' personal and financial affairs were deeply integrated, and the recipient's contributions and sacrifices for the family were longstanding and significant — will most likely justify full or substantial sharing of post-separation income increases. [para. 74]

The father argued that the trial judge erred by basing spousal support on his post-separation income, claiming the judge gave insufficient weight to the parties' respective means, needs, and roles, and that the resulting order gave the mother a higher standard of living than she enjoyed while married.

The Court of Appeal rejected these arguments, finding that Justice Kurz had carefully applied the governing principles and properly considered all relevant factors. Importantly, it noted that the trial judge achieved partial sharing of the father's post-separation income by setting support at the lower end of the higher SSAG range, thereby moderating the mother's share of his increased earnings. The Court refused to re-weigh the evidence and dismissed this ground of appeal.

Issue Three: Quantum and Duration

The Court of Appeal dismissed the father's third ground of appeal — challenging both the amount and duration of the award — and confirmed several key principles:

1. **NDI Is a Tool, Not a Target:** Net Disposable Income (NDI) is not a formula or goal but a method to assess the fairness and reasonableness of different support outcomes. [para. 47]
2. **No Upper NDI Limit:** There is no ceiling on the proportion of NDI a support recipient may receive. What matters is actual cash flow and ability to pay, not just percentage shares. [para. 48]
3. **NDI Tests Reasonableness, Not Entitlement:** NDI should be used to check the fairness of an award, not to determine entitlement or as a strict numerical target. [para. 49]

4. **In High Income Cases, SSAG Ranges Are Guides, Not Formulas:** For high-income earners, the SSAG must be applied flexibly as a tool to guide a fact-specific and individualized analysis, not as a mechanical calculation. [paras. 54-55]

5. **Discretion Above The Ceiling:** The \$350,000 SSAG income ceiling is not a hard cap. Above that level, an additional formula range is created, with appropriate income inputs ranging from \$350,000 to the full actual income. Entitlement determines the proper location within that range. [paras 54-55]

6. **Entitlement Influences Quantum and Duration:** The same factors that establish entitlement also guide the location within or outside the SSAG ranges, affecting both amount and duration of support. [para. 56]

7. **Individualized, Case-Specific Assessment Required:** Even in high-income cases, SSAG ranges must still be calculated, but courts must exercise discretion to reach an outcome grounded in the specific facts and fairness. [para. 58]

As with the father's other arguments, the Court of Appeal found no error in the trial judge's determination of the amount or duration of spousal support, nor in his approach or exercise of discretion. The decision underscores the broad deference owed to trial judges in tailoring support awards, particularly in high-income cases, where fairness, not formulae, governs the outcome.

A final point. An award of \$20,000 a month for 12 ¹/₂ years for a recipient imputed to earn \$550,000 a years is a high, lengthy award of support in the context of a 14-year marriage — especially in combination with child support of \$24,661 a month. While the father, we're sure, was not happy with the result, it will serve a cold comfort to realize that it could have been far worse. Further, he leaves the litigation with a set support end date and at least some light at the end of the tunnel — albeit a very distant light at the end of a very long tunnel. Many support payors in similar circumstances are faced with indefinite spousal support orders. Certainty is worth something.

Conclusion

R.L. v. M.F. brings some clarity to some of the most nuanced areas of spousal support law — entitlement, post-separation income growth, and the exercise of discretion in high-income cases. It may not be the sort of clarity that payors want, but it is clarity. It underscores that while formulas and frameworks can guide outcomes, fairness remains the ultimate measure. The Court of Appeal's decision also reinforces how difficult it is to unsettle a well-reasoned trial judgment on support: if the right principles are applied and the result is within the range of reasonableness, it will stand. For practitioners, the case is both a roadmap and a reminder: most spousal support battles are won or lost at trial, and that appellate courts will only step in where the line between discretion and error has truly been crossed.

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