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

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Sometimes Good Deeds Do Go Unpunished

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For two main reasons, it is generally easier for a recipient to successfully claim retroactive child support than it is for a payor to successfully claim a retroactive reduction.

First, the legal test for a recipient to obtain retroactive child support that was first established by the Supreme Court of Canada in *S. (D.B.) v. G. (S.R.)* (2006), 31 R.F.L. (6th) 1 (S.C.C.), and subsequently clarified/modified in *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.); *Henderson v. Micetich* (2021), 54 R.F.L. (8th) 295 (Alta. C.A.); and *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.) is far less onerous than the test for a payor to obtain a retroactive reduction. At paragraphs 113(2) and 114(b) of *Colucci*, the Supreme Court explained that while "effective notice" for a payor seeking a retroactive reduction "requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation", "effective notice" for a recipient seeking a retroactive increase "requires only that the recipient broached the subject of an increase with the payor." One might argue the unfairness of such dichotomy is readily apparent in cases like *Jonas v. Akwiwu* (2021), 62 R.F.L. (8th) 1 (Ont. C.A.) — but it is what it is.

As Professor Rollie Thompson explained in "Retroactive Support After *Colucci*", which is available on Westlaw at 40 C.F.L.Q. 61 and is definitely worth reading if you haven't already done so:

> . . . Despite the use of the term "effective notice" [in both the "retro up" and "retro down" tests from *Colucci*], don't be fooled. [The "retro down" test requires] a very different kind of "effective notice" from that used in *D.B.S.* or *Michel v. Graydon* or any other "retro up" case. The payor must give "notice" to the recipient and must provide disclosure in support. It's not enough merely to "broach" the subject. The payor must also provide "reasonable proof" of changed income, or there's no "effective notice". If there's no "effective notice", then under step (3) the presumptive date for retroactivity will be the date of "formal notice", typically the much later date when the payor files an application to vary. [footnotes omitted

Second, from a practical standpoint, while judges are obviously required to apply the law, they also inevitably want to achieve a result that seems and feels fair based on the particular facts of each case before them. And, unless the recipient is wealthy and can reasonably afford to repay money that they either already received, or forgo money that they reasonably expected to receive but didn't, it is hard to persuade a judge that forcing a recipient to repay or forgo money that they do not have and/or were reasonably expecting to receive would constitute a just result.

Accordingly, it is relatively rare to find cases where a payor has been able to successfully persuade a judge to grant a retroactive reduction. But that is precisely what the payor father was able to do in *Murray v. Veilleux*, largely because he was able to show that he had more than met his child support obligations over a very long period of time, the children's needs had all been met, and the recipient mother had no real need for the additional child support that was in issue.

The basic facts in *Murray* were as follows:

- The parties were married in 2000 and separated in 2007. They had 2 children together.
- The father was a doctor and the mother a nurse. They were both financially well-off.
- In 2011, the parties consented to an Order that required the father to pay the mother $4,196 a month in child support for both children, and they consented to a further Order in 2012 that increased the child support payments to $5,400 a month.
- In 2013, the parties implemented a 50-50 shared parenting arrangement. Despite the increase in his parenting time, the father continued paying full Table child support for both children.
- From 2013 to 2020, the parties exchanged annual disclosure and adjusted the father's child support payments accordingly.
- When the parties' elder child started attending university away from home in September 2020, the father reduced his child support payments so he was only paying Table child support for the younger child. He also paid for all the eldest child's living and educational expenses.
- When the parties' younger child started attending university away from home in September 2022, the father stopped paying Table child support to the mother entirely, but paid for all of both children's living and educational expenses without contribution from the mother.
- In August 2023, the mother registered the 2012 Order with the Family Maintenance Enforcement Program. Even though both children were away at university for most of the time in issue and spent equal time with both parties when they were not in school, the mother claimed more than $110,000 in arrears (and almost $180,000 by the time of the hearing before Justice Coval), which represented the full amount of Table child support she said the father ought to have paid since the elder child went away to university in September 2020. She also claimed ongoing child support of $5,400 a month, which was the monthly amount the father had agreed to pay in 2012 when the children were young and were still living primarily with the mother.

In response to the mother's decision to register the 2012 Order for enforcement and attempt to collect significant arrears and ongoing child support, the father brought an application to retroactively vary the 2012 Order under s. 17(1) of the *Divorce Act*, which permits a court to vary a child support Order "retroactive or prospectively". He argued, among other things, that the parties had reached an agreement in 2020 that when each child went away to university, he would pay for their expenses in lieu of paying child support to the mother.

In support of his position, the father relied on an alleged verbal agreement from February 2020, and a series of emails he exchanged with the mother in October 2020 that ended with the mother writing to the father that "I am fine with the current child support calculation[.]" The father also argued that he met the test for a retroactive variation from *Colucci*, and also relied on ss. 17(6.1) and 17(6.2) of the *Divorce Act*, which provide as follows:

> 17(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

> 17(6.2) Notwithstanding subsection (6.1), **in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied**
>
> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or **that special provisions have otherwise been made for the benefit of a child**; and
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> (b) that **the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions**. [emphasis added]

[For further discussion about the "special provisions" sections of the *Divorce Act* and the various provincial child support statutes, see our comment on the Ontario Court of Appeal's decision in *Zhao v. Xiao* (2023), 92 R.F.L. (8th) 265 (Ont. C.A.) ("I'll Gladly Pay You Tuesday for a Matrimonial Home Today"). See also *Quinn v. Keiper* (2007), 42 R.F.L. (6th) 339 (Ont. S.C.J.), where the court explained that "a special provision is one which: is out of the ordinary or unusual; replaces the need for ongoing support; and benefits the child. The parties' intention is not relevant; what is critical is whether the provision objectively benefits the child. An important factor to consider is how the level of support in the agreement compares to the support that would otherwise be required under the *Guidelines*."]

The mother, on the other hand, argued that she had never agreed to vary the 2012 Order in accordance with the arrangements imposed by the father, and that the father could not meet the test for a retroactive variation. She also claimed that when she emailed the father in 2020 that she was "fine" with his proposed child support arrangements, she "did not mean that I agreed with the [father's] unilateral decision to stop Child Support for our daughter.. without amendment to our agreement. It meant that, under duress, I did not want to go back to court again for mental health and financial reasons."

In rejecting the mother's position and accepting the father's, Justice Coval made a number of key findings, including that:

> 1. Even if the mother's explanation for why she told the father that she was "fine" with the child support arrangements in 2020 was true, which was at best unclear, "[s]uch subjective understandings and intentions, which on the evidence were not communicated to [the father], are irrelevant to the assessment of whether the parties in fact reached an agreement to vary [the father's] child support obligations."
>
> 2. From an objective standpoint, "a reasonable person would have understood that, as of October 2020, [the mother] did agree with the new support arrangement."
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> 3. The child support arrangements that the parties had agreed to in October 2020 "provided a fair and reasonable standard of financial support for [the children] and a fair and reasonable financial arrangement as between the parties themselves."
>
> 4. The father had "gone above and beyond his child support obligations under the *Guidelines*" for many years.
>
> 5. The agreed upon child support arrangements had not caused any financial hardship or sacrifice for the mother.

Furthermore, although the mother tried to argue that *Colucci* supported her position, Justice Coval found that the opposite was true, as *Colucci* makes it clear that the law should be encouraging parties to settle family law disputes outside of court by upholding negotiated settlements:

> [47] **In my view, contrary to her submissions, [the mother's] position is not supported by *Colucci*. *Colucci* endorses the "trend in family law away from an adversarial culture of litigation to a culture of negotiation" and encourages parents to reach "fair agreements" (para. 69), which is what occurred here.** Upholding the arrangement reached between the parties also serves the key child support objectives identified in *Colucci* (para. 4). That is, the daughters have received an appropriate amount of support; the parties had the flexibility to alter the child support obligations to reflect

> the material change in circumstances when their daughters went away to university; and, certainty and predictability are upheld by respecting the agreement they reached in 2020 and followed for almost three years thereafter. [emphasis added]

To this we would add that, unlike the father in *Murray*, the father in *Colucci* was a true scoundrel, and had engaged in all sorts of blameworthy conduct. He refused to provide disclosure. He was absent from the children's lives. He made no voluntary payments for well over a decade. He waited almost two decades to commence a variation proceeding. Furthermore, unlike the situation in *Murray*, the mother was not wealthy and struggled to meet the children's needs for many years, and the children were forced to incur significant debt to be able to attend post-secondary school.

The facts of the two cases could not have been more different.

Is the result in *Murray* an outlier? Or does it simply represent the proper application of the principles from *Colucci*? We suspect this may a case of the stars aligning for a payor that had not engaged in any blameworthy conduct. The mother's email of October 2020 was not ambiguous. The mother had taken over a decade to register the 2012 Order for enforcement. And the mother was financially secure. But had any of these facts changed — who knows?

The lesson?

Despite what some might think, being above board and doing the right thing really can pay off, even in family court.

Extra! Extra!! Read All About it! Marriage Contract Upheld on Motion for Summary Judgment!

Singh v. Khalill, 2024 CarswellOnt 19477 (C.A.) — Nordheimer, Copeland and Madsen JJ.A.

Issues: Ontario — Determining the Validity of a Marriage Contract on a Summary Judgment Motion

This was the Appellant/Husband's appeal from a decision finding the marriage contract between the parties, signed March 3, 2017 (the "Marriage Contract"), valid and enforceable.

The parties married in 2016 and separated in 2020.

In 2017, the Respondent/Wife became worried about the relationship and prepared a Marriage Contract. Although the Husband signed the Contract with a lawyer, he did not ask for or receive legal advice. Nevertheless, the lawyer signed a Certificate of Acknowledgment confirming that the Husband understood the Agreement he was signing, and that he was signing voluntarily and without compulsion.

The Contract provided that the parties were separate as to property and that there would be no support payable by either party.

The Husband brought a motion for summary judgment to have the Contract set aside based on the arguments that he was not provided with full disclosure before signing the Marriage Contract and that he signed it under duress in an effort to save the marriage. The Wife brough a cross-motion confirming the validity of the Contract. The court below upheld the Contract.

The Husband appealed.

He argued that the validity of the Marriage Contract should not have been determined on a motion for summary judgment and that a trial was required to fairly address conflicts in the evidence and credibility issues, pursuant to Rule 16(6.2) of the *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*").

The Court of Appeal was not swayed.

First, the Court of Appeal invoked the "Chutzpah Doctrine." It was the *Husband's* motion for summary judgment — and brought after not one but *two* judges suggested that the issue of the validity of the marriage contract should be addressed on motion. The Wife had simply brought the opposite cross-motion. Having brought the original motion, the Husband was poorly placed to suggest that the validity of the Contract should not have been determined on motion.

The Court of Appeal had no issue with the process by which the validity of the Contract was determined. The procedure was proportionate and wholly in keeping with the direction under Rules 2(3)-(5) of the *Family Law Rules* to ensure that matters are dealt with in a manner that saves expense and time, and is appropriate to their complexity and importance, while giving appropriate court resources to the case.

Both parties had understood that to the extent the Marriage Contract was found to be valid, this would be a final order that would put an end to the application.

The determination of whether summary judgment is the appropriate procedure is a question of mixed fact and law and entitled to deference absent an error of law: *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.) at paras. 80-84. Further, whether the court determines that oral evidence is to be presented by one or more parties (under Rule. 16(6.2)) is a discretionary determination, and also entitled to deference. And although the motion judge did not *expressly* state that there was no genuine issue requiring a trial - it was implicit in the reasons.

The motion judge set out the law governing the setting aside of a marriage contract under s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3, and accurately summarized the factors for consideration.

Notably, the Court of Appeal also endorsed the motion judge relying on Justice McGee's decision in *Harnett v. Harnett* (2014), 43 R.F.L. (7th) 464 (Ont. S.C.J.), 43 R.F.L. (7th) 464 wherein her Honour sets out a list of considerations with respect to upholding marriage contracts - especially where the party seeking to set aside the agreement is not the victim of the other party, but rather of his or her own failure to self-protect:

> [87] As a general rule, courts will uphold the terms of a valid enforceable domestic contract: *Hartshorne v Hartshorne*, 2004 SCC 22 (CanLII), 2004 CarswellBC 603 (SCC.)
>
> [88] It is desirable that parties settle their own affairs: *Farquar v. Farquar* (1983), 35 R.F.L. (Ont. C.A.) and courts are generally loathe to set aside domestic contracts. See page 297:
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> > "the settlement of matrimonial disputes can only be encouraged if the parties can expect that the terms of such settlement will be binding and will be recognized by the courts . . . as a general rule . . . courts should enforce the agreement arrived at between the parties. . . . The parties to the agreement need to be able to rely on [them] as final in the planning and arranging of their own future affairs"
>
> [89] Parties are expected to use due diligence in ascertaining the facts underlying their agreements. A party cannot fail to ask the correct questions and then rely on a lack of disclosure: *Clayton v Clayton* 1998 CanLII 14840 (ON SC), 1998 CarswellOnt 2088.
>
> [90] A domestic contract will be set aside when a party was unable to protect his or herself. Such cases are generally predicated upon a finding that one party has preyed upon the other, or acted in a manner to deprive the other of the ability to understand the circumstances of the agreement.
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> [91] The court is less likely to interfere when the party seeking to set aside the agreement is not the victim of the other, but rather his or her own failure to self-protect. The Ontario Court of Appeal in *Mundinger v. Mundinger* (1968), 1968 CanLII 250 (ON CA), [1969] 1 O.R. 606 (Ont. C.A.) says that the court will step in to "protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so because of their position."
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> [92] The court must look not at which party made the better bargain but rather, to whether one party took advantage of their ability to make a better bargain. In that taking of advantage is to be found the possibility of unconscionability. See *Rosen v. Rosen* (1994), 1994 CanLII 2769 (ON CA), 3 R.F.L. (4th) 267 (ONCA).

> [93] The test for unconscionability is not weighing the end result, but rather the taking advantage of any party due to the unequal positions of the parties. See *Mundinger v. Mundinger* (1968), 1968 CanLII 250 (ON CA), [1969] 1 O.R. 606 (Ont. C.A.); *Rosen v. Rosen* (1994), 1994 CanLII 2769 (ON CA), 3 R.F.L. (4th) 267 (Ont. C.A.).
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> [94] The onus is on the party seeking to set aside the domestic contract to demonstrate that at least one of the circumstances set out in subsection 56(4) has been met; then the court must determine whether the circumstances complained of justify the exercise of the court's discretion in favour of setting aside the contract. It is a discretionary exercise. See *LeVan v LeVan*. 2008 ONCA 388 (CanLII), 2008 CarswellOnt 2738 ONCA.
>
> [95] A finding that a party violated a provision of s. 56(4) of the FLA does not automatically render the contract a nullity. Rather, a trial judge must determine whether it is appropriate, in the circumstances, to order that the contract be set aside. It is a discretionary exercise: LeVan paragraph 33.
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> [96] The lack of independent legal advice is not by itself determinative. It is only one factor: *Dougherty v. Dougherty* 2008 ONCA 302 (CanLII), 2008 CarswellOnt 2203 ONCA; *Raaymakers v. Green* 2004 CarswellOnt 2712

See also *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.) for the proposition that courts should generally strive to uphold domestic contracts and that there should be no presumption or hesitation in doing so.

Here, there was no need for oral evidence. There was no need for a "mini-trial" under Rule 16(6.1) or for a full trial. Nor was there any error in the motion judge making findings of fact and credibility on the written materials. On the Husband's own evidence:

> 1. He "had not bothered" to read the Marriage Contract before signing it;
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> 2. He had significant experience with various legal proceedings;
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> 3. He was capable of understanding contracts (admitted he had read "thousands" of them);
>
> 4. He had substantial assets and income when the parties married and was thus not concerned about the financial consequences of the Marriage Contract.

Then, to the extent that the motion judge made credibility findings against the Husband, those findings arose directly from conflicts and contradictions in his own evidence.

Any alleged conflicts in the evidence were not material. For example, while the parties disagreed on how long the Husband had the Marriage Contract before he signed it, the significant factor was that, whenever he received it, he did not read it. Also, while there was a question as to whether the Husband had received a copy of the Wife's "Schedule of Assets" before signing the Contract, that did not matter given the Husband's admissions that he did not read the Contract; that he had substantial assets and income when the parties married; and that he was not concerned with the financial consequences of the Contract.

Ultimately, the Court of Appeal agreed that there was no credible evidence that the Wife had taken advantage of the Husband or had exploited any unequal bargaining power.

The Court of Appeal found no errors here.

The Husband also argued that the motion judge should have sent the matter of spousal support to trial. The Husband had been in a car accident post-separation and argued that his injuries impacted his ability to earn income. He argued that a full trial was required to conduct a proper *Miglin* analysis of his spousal support claim: *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.) at paras. 80-91.

The motion judge addressed the lack of evidence put forward by the Husband with respect to a claim for spousal support. The motion judge noted the "thin" evidence to support any support claim; the fact that the injury took place post-separation; the lack of evidence about the parties' roles during the relationship; and the short duration of the marriage.

Now, while a trial is *often* (but not *always*) required to conduct a full *Miglin* analysis, and while the findings of the motion judge were likely not in error — here they were wholly unnecessary because the Husband had not actually claimed spousal support in his Application or on the motion.

Ask and ye may get; don't ask and . . . well . . . sorry.

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