FAMLNWS 2025-10

Family Law Newsletters
March 17, 2025

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

The Retirement Edition (Now with 100% less payments!)

***Fielding v. Fielding*, 2024 CarswellOnt 17060 (C.A.) — Lauwers, Brown and Coroza JJ.A.**

***T.D.M. v. R.M.M.* (2024), 6 R.F.L. (9th) 202 (P.E.I. S.C.) — MacDonald J.**

***Starra v. Starra*, 2024 CarswellOnt 19244 (Ont. S.C.J.) — Desormeau J.**

Issues: Federal (*Divorce Act*) — Varying Spousal Support Upon Retirement

" . . . [T]here is no hard and fast rule to be applied in every case about when or at what particular age a support payor is entitled to retire and seek a reduction or termination of spousal support. An examination of the facts of each particular case is required and this examination may result in a different conclusion in different cases depending on the specific facts of each case."

— Justice Trousdale in *St-Jean v. Fridgen* (2017), 3 R.F.L. (8th) 92 (Ont. S.C.J.) at para. 38

Retirement may mark the end of a career, but does it also necessarily mean the end of spousal support? Courts continue to grapple with when and how a payor spouse can retire without being indefinitely tied to support obligations, while also ensuring fairness for the recipient. In this edition of *TWFL*, we start with a review of the legal framework governing support termination upon retirement. We then examine three recent cases — *Fielding v. Fielding* (Ontario Court of Appeal), *T.D.M. v. R.M.M.* (PEI Supreme Court), and *Starra v. Starra* (Ontario Superior Court) — that shed light on how courts are dealing with payors looking to close the books on support as they step into their dotage.

The Legal Framework

Stage One — Has There Been A Material Change In Circumstances?

Under **s. 17 of the *Divorce Act***, as well as equivalent provisions in provincial support legislation, courts in Canada have the jurisdiction to vary a spousal support order if the party seeking the variation can demonstrate a **material change in circumstances**. The Supreme Court of Canada provided helpful guidance on what qualifies as a material change in ***Droit de la famille - 09668* (2011), 6 R.F.L. (7th) 68 (S.C.C.)** ("*R.P.*"), a companion case to the more frequently cited ***L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.)**. In *R.P.*, the court clarified the test for establishing a material change, setting the foundation for how retirement-related variations are to be assessed:

> [25] Under s. 17(4.1) of the *Divorce Act*, **the moving party must establish that there has been a material change of circumstances** since the making of the prior order or variation. The applicable framework for this case is the one elaborated in the companion decision, *L.M.P.* To be material, **a change must be one which, if known at the time, would likely**

> **have resulted in different terms to the existing order.** On an application to vary, the court should consider the terms of the order and the circumstances of the parties at the time the order was made to determine whether a particular change is material. **The existing order is deemed to have been correct and only if the requirements of s. 17 of the *Divorce Act* are met will there be a variation.** [emphasis added]

Despite some inconsistency in the caselaw, one principle remains clear: *foreseeability* is *irrelevant* to the material change analysis. As the B.C. Court of Appeal put it in *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.) at para. 25:

> As articulated in *L.M.P.*, the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered . . .

While the ideas of "foreseen" and "foreseeable" are still sometimes confused, this approach has been reinforced multiple times by multiple courts, including in *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.) at paras. 29-31, *Q.D.T. v. H.L.D.*, 2020 CarswellNB 142 (C.A.) at para. 13, *S.M. v. J.A.* (2023), 83 R.F.L. (8th) 22 (N.L. C.A.) at paras. 122-125, and *Chemilnisky v. Chemilnisky* (2024), 8 R.F.L. (9th) 263 (Alta. K.B.) at para. 49.

(To understand why "foreseeability" is not a valid consideration, consider this: if the standard was "foreseeability", retirement would never be a material change, as it is always "foreseeable" that someone will, one day, retire. The crux of the matter is whether future retirement was actually considered at the time of the order that is sought to be varied.)

In *St-Jean v. Fridgen* (2017), 3 R.F.L. (8th) 92 (Ont. S.C.J.), Justice Trousdale outlines a non-exhaustive list of factors to consider when assessing whether retirement constitutes a material change in circumstances for spousal support purposes. These factors help courts determine (and counsel argue) whether a payor's decision to retire justifies a reduction or termination of support:

> [37] Whether a support payor spouse may seek a reduction or termination of spousal support upon retirement depends on an examination of the individual facts and circumstances of each case which may include:
>
> (a) The age of each party at the date of separation and at the current date;
>
> (b) The length of the marriage;
>
> (c) Whether there were children born of the marriage;
>
> (d) The role which each party played in the marriage;
>
> (e) The financial circumstances of each party at the date of separation and at the current date including income, expenses, assets and debts;
>
> (f) Whether either party has re-partnered;
>
> (g) The medical situation of each party if relevant, supported by medical evidence;
>
> (h) Whether there has been a material change in circumstances of either party;
>
> (i) Whether the spousal support was needs-based support or compensatory support or contractual support or some combination thereof;
>
> (j) The period of time subsequent to separation and/or the order that the support payor spouse has paid spousal support;
>
> (k) What the intention of the parties was at the date of the order and/or the date of the separation agreement, if ascertainable from the order and/or separation agreement;

(l) Whether the order and/or separation agreement dealt with the issue of retirement or with the issue of age of retirement;

(m) The reasons for retirement including whether the retirement was voluntary or was beyond the control of the support payor spouse;

(n) Whether either party has any economic advantages or disadvantages arising from the marriage or its breakdown;

(o) Whether there are any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(p) Whether there is any economic hardship of the former spouses arising from the breakdown of the marriage;

(q) Whether each spouse is or may become economically self-sufficient within a reasonable period of time;

(r) What, if any, is the range of spousal support provided for pursuant to the Spousal Support Advisory Guidelines on the parties' incomes at the current time; and

(s) Any other relevant circumstance.

If the court finds no material change in circumstances, the analysis stops there — support continues as ordered. However, if a material change is established, the court must proceed to the second stage of the analysis, determining what, if any, variation in support is appropriate.

Stage Two — What Variation, If Any, Should Be Made?

Once a material change has been established, *L.M.P.* confirms that courts must follow a specific and measured approach to variation. Specifically, they must:

(a) Consider the statutory support factors and objectives in s. 17(7) of the *Divorce Act* (or equivalent provincial legislation);

(b) Limit the variation to what is appropriate in light of the determined change; and

(c) Avoid treating the variation as a fresh application for support under s. 15.2 of the *Divorce Act*.

The goal is to *adjust*, not to redo, the original order.

Case #1: *Fielding v. Fielding*, 2024 CarswellOnt 17060 (C.A.) — Lauwers, Brown and Coroza JJ.A.

Disclosure: Epstein Cole LLP represented the respondent in *Fielding*.

The parties married in 1993, separated in 2010, and had three children together. The father, a plastic surgeon, was the primary earner, while the mother, a trained urologist, had stopped working before separation due to a hereditary eye condition.

In 2014, Justice Mesbur ordered the father to pay child support pursuant to the *Child Support Guidelines*, along with $10,000 per month in spousal support ((2014), 39 R.F.L. (7th) 109 (Ont. S.C.J.)). The mother appealed, seeking more, but the Court of Appeal dismissed her appeal in 2015 ((2015), 70 R.F.L. (7th) 253 (Ont. C.A.)). A later attempt by the mother to increase the father's spousal support payments was dismissed by Justice Monahan (as he then was) in 2018 (2018 CarswellOnt 15895 (S.C.J.)).

In early 2021, the father informed the mother of his plans to retire at age 64 by year's end and asked for her consent to stop spousal support (yes . . . sometimes recipients actually consent to the end of support). When consent was not forthcoming, the father brought a Motion to Change to terminate Justice Mesbur's 2014 spousal support order.

The mother opposed the Motion to Change, arguing the father's retirement was premature and unreasonable, particularly given his ongoing support obligations — both to her and their youngest daughter, who was still in university. Not only did the mother insist that spousal support continue, she doubled-down: she argued that the father's payments should increase significantly from the $10,000 a month he was paying because her disability insurance income would end when she turned 65 in February 2022.

In November 2022, the matter was heard by Justice Pinto. By that time, the father had already retired, and the mother's disability insurance payments had already ended — turning what had been a debate over future events into a dispute over then-present realities.

At the first stage of the analysis — whether there had been a material change in circumstances — Justice Pinto applied the *St-Jean* factors, and concluded that the father's retirement was reasonable and met the material change threshold because:

1. The father had actually retired.

2. At the time of the father's retirement, he was almost 64-years-old and had already worked as a physician for 40 years.

3. While the mother claimed that most plastic surgeons retire at 70, she offered no objective evidence to back this claim up.

4. The COVID-19 pandemic had created hospital closures, staffing issues, policy changes, and heightened health risks, all of which made early retirement reasonable.

5. At the 2014 support trial, the father had testified that he "certainly [did] not see [himself] working past sixty-five", and Justice Mesbur had noted this in her decision.

6. He had kept the mother informed about COVID-19's impact on his practice and gave her eight months' notice of his retirement plan.

7. He had health issues that made standing and operating for long periods difficult.

8. He had already paid spousal support for 12 years and made a significant equalization payment.

9. Their children were all adults, and two were financially independent.

Thus, the court was satisfied that the father's retirement was reasonable and constituted a material change — opening the door to the second stage of the analysis.

At the second stage of the analysis — determining what variation, if any, should be made — Justice Pinto reviewed the parties' finances and concluded that terminating spousal support as of the father's retirement was appropriate because:

1. The parties had similar net worths — the mother at $4.9 million, the father at $4.4 million.

2. The mother was capable of meeting her reasonable needs using her capital and the income it could generate if managed prudently.

3. Any economic hardship from the marriage and its breakdown had long already been addressed through 12 years of support payments.

> 4. Any current financial difficulties the mother might be having were not a result of the marriage or its breakdown but rather the mother's own financial decisions.

With that, the court terminated spousal support and ordered the mother to repay the support she had received since the father retired at the end of 2021. It also ordered the mother to pay the father $295,000 in costs.

The mother appealed Justice Pinto's decision on both stages of the analysis. The Court of Appeal dismissed her appeal in its entirety.

At the first stage, the court was satisfied that Justice Pinto had applied the law correctly and properly assessed the reasonableness of the father's retirement at 63. It emphasized that reasonableness determinations are best left to trial judges, and appellate deference was owed — a useful comment for future cases that go either way.

At the second stage, the Court of Appeal also found no error in Justice Pinto's decision to terminate spousal support, concluding that it was reasonable in the circumstances.

As a result, the mother's appeal was dismissed.

Case #2: *T.D.M. v. R.M.M.* (2024), 6 R.F.L. (9th) 202 (P.E.I. S.C.) — MacDonald J.

The parties were married from 1991 to 2010 and had one child together. During the marriage, they agreed that the mother would leave the workforce to stay home and care for the child, while the father worked as a linesman and foreman for various power companies, supporting the family financially.

Although the mother tried to return to work after their child started school, she stopped working again from 2000 to 2010 due to mental health issues. However, shortly before separation, her condition improved, and she was able to resume working part-time as a bookkeeper at Tim Hortons.

In 2013, the parties signed a Separation Agreement, which provided that the father's spousal support payments would be reviewed upon the later of his retirement or his 60th birthday.

The father turned 60 in December 2022, and he retired in January 2023. As soon as he retired, the father asked the mother to consent to terminate his spousal support payments, which at that point totalled $2,350 a month.

Obviously, since the father had, in fact, retired, the mother readily agreed to his request to terminate support.

Just kidding.

Instead — true to form in these types of cases — the mother rejected the father's request, arguing that his retirement was premature and unreasonable. In her view, the father should keep paying support as if he were still working, even though he was not. She also argued that 65 would be a more appropriate retirement age, though she provided no expert evidence to support this claim.

This was a tough one.

On one hand, the father retired at a relatively young age from a $150,000-a-year job, fully aware that the mother still needed support — she was, after all, only earning about $30,000 a year from her job and had no significant savings. Terminating or significantly reducing support would not just make things difficult for the mother — it would make them dire.

On the other, the father had already supported the mother for 14 years, had spent nearly 40 years working as a linesman and foreman, and the mother had, in fact, *agreed* to a review of support on the later of his retirement or his 60th birthday — strongly suggesting she knew this day would eventually come.

Justice MacDonald began her analysis by recognizing that, because the parties had agreed to a *review* upon the father's retirement, this was not a variation case requiring a material change analysis. Instead, she had to determine what issues were to be reviewed, and what new support arrangements should be put in place.

[For more on the differences between spousal support reviews and variations, see our discussion of the Prince Edward Island Court of Appeal's decision in *F. (L.C.) v. B. (W.P.)* (2023), 94 R.F.L. (8th) 1 (P.E.I. C.A.) — "A Review of Reviewing Reviews" — in the May 27, 2024 (2024-20) edition of *TWFL*.]

Since the review clause was broadly worded with no specific limits on what could be considered, Justice MacDonald found that it effectively called for a *de novo* determination of spousal support. Unless a review clause sets out limitations on the scope of the review, a review is a hearing *de novo* and encompasses determination of each of the issues of entitlement, quantum and duration: *Domirti v. Domirti*, 2010 CarswellBC 2864 (C.A.) at paras. 38-39; *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.) at para. 17; *M.T. v. J.S.* (2023), 86 R.F.L. (8th) 281 (B.C. C.A.); *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.); *Verkaik v. Verkaik* (2020), 49 R.F.L. (8th) 69 (Ont. Div. Ct.).

That said, a review *order* (as opposed to a review clause in a Separation Agreement) should generally be precisely circumscribed and set out the issue or question to be reviewed or reconsidered with some specificity: *S. (R.M.) v. S. (F.P.C.)* (2011), 90 R.F.L. (6th) 1 (B.C. C.A.); *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.); *Seymour v. Seymour* (2015), 65 R.F.L. (7th) 93 (Sask. Q.B.); *Kletzel v. Kletzel* (2005), 16 R.F.L. (6th) 137 (Sask. Q.B.); *Chu v. Eastman* (2016), 83 R.F.L. (7th) 259 (B.C. C.A.); *Westergard v. Buttress* (2012), 14 R.F.L. (7th) 1 (B.C. C.A.); *Dumont-Dizy v. Dizy*, 2015 CarswellSask 207 (Q.B.).

Here, the court was dealing with a review clause in an Agreement.

While the mother may have once been entitled to compensatory support, Justice MacDonald found that 14 years of payments had satisfied any compensatory claim. However, given the mother's limited income and net worth, she remained entitled to support on the basis of need.

As part of assessing the parties' needs and means, Justice MacDonald considered but rejected the mother's argument that the father should be imputed with income on the basis that his retirement was unreasonable. The court found no evidence that the father retired at 60 to avoid spousal support. After 40 years in a physically demanding job, he had suffered multiple injuries and was dealing with chronic pain and arthritis. The strain of 16-hour shifts during Hurricanes Dorian and Fiona, along with his partner's health issues, made retirement reasonable. His decision to retire was not made in bad faith.

Based on the father's retirement income of $43,500 a year and the mother's income of $29,000, the *Spousal Support Advisory Guidelines* (the "*SSAG*s") suggested a range of $344 to $459 a month for 9.5 to 19 years. The father had already paid support for 14 years and had been significantly overpaying since retiring in January 2023, continuing to pay $2,350 a month despite only owing a fraction of that amount based on his income. The solution? Allow the mother to keep the overpayments but terminate support as of the date of the decision (September 4, 2024) — not an unreasonable result in the circumstances.

Case #3: *Starra v. Starra*, 2024 CarswellOnt 19244 (S.C.J.) — Desormeau J.

The parties were married in 1982 and separated in 2007. They had three children together. The father was a doctor and specialized in internal medicine. He also worked in the emergency room and intensive care unit.

The mother was trained as a teacher, but she left the workforce after just one year to care for and homeschool the children. She also struggled with mental health issues that prevented her from working outside the home.

In 2013, the parties consented to a final order, which required the father to pay the mother $15,500 a month in spousal support.

In April 2024, the father notified his department and patients that he intended to start winding down his practice on June 1, 2024, with full retirement expected within six to 12 months. Before retiring, he needed to meet all his patients and ensure they

had continuity of care. This process required the father to stop accepting new patients and on-call shifts, leading to a significant income decline in the latter half of 2024.

Unlike in *T.D.M.* but similar to *Fielding*, the initial order did not include a review clause. As a result, Justice Desormeau applied the two-stage variation framework.

At the first stage — whether there had been a material change in circumstances — Justice Desormeau applied the *St-Jean* factors and found the father's retirement was reasonable given that:

- He would be turning 64 in December and had worked as a doctor for 38 years.
- His job was stressful and demanding, particularly since the pandemic.
- He had already paid the mother $2.1 million in spousal support.
- The parties had similar net worths — $1.575 million for the mother and $1.18 million for the father.

At the second stage — determining what variation, if any, should be made — Justice Desormeau relied on expert evidence about the parties' projected retirement incomes and the *SSAG*s. She concluded that the appropriate result was:

- Mid-*SSAG* support of just under $6,000 a month from June 1, 2024, as the father wound down his practice.
- Mid-*SSAG* support of just over $1,400 a month (rounded) for 2025 and 2026, after which support would end.

Because this Order resulted in an overpayment of $9,500 a month for June to December 2024 ($66,500 total), the result of Justice Desormeau's order was that the support the father owed for 2025 and 2026 would be fully offset (and then some) by the approximate $66,500 the mother owed him in overpaid support for the latter half of 2024.

Some Concluding Thoughts

While the facts in *Fielding*, *T.D.M.*, and *Starra* were different — as they always are in these cases — there are a few common themes worth keeping in mind when dealing with a request to terminate spousal support:

1. **Judges prefer support payors who act reasonably:** In all three cases, the payor: historically paid what they were supposed to pay when they were supposed to pay it; waited until they were in their 60s to retire; had a reasonable explanation for retiring; gave the recipient ample notice; and kept paying in accordance with the most recent agreement or order even if it created short term hardship.

2. **Retirement should be real — or at least inevitable:** Courts are generally unwilling to terminate support based on hypothetical retirement plans. While there are exceptions (*Choquette v. Choquette* (2019), 25 R.F.L. (8th) 150 (Ont. C.A.)), they usually involve other compelling reasons beyond mere anticipation of retirement. If the payor hasn't actually retired, they should be on the verge of doing so with no turning back.—*Generally*, a variation should not be determined on the basis of speculative future events: *Carey v. Carey* (2021), 59 R.F.L. (8th) 440 (B.C. S.C.) at para. 37; *Regisford v. Regisford*, 2017 CarswellOnt 1037 (S.C.J.) at para. 63; *Schmidt v. Schmidt* (1998), 36 R.F.L. (4th) 1 (B.C. C.A.) at para. 25, (1998), 36 R.F.L. (4th) 1 (B.C. C.A.). However, in some circumstances, courts will allow a variation based on near future, imminent retirement: *Hayes v. Hanrieder* (2009), 66 R.F.L. (6th) 112 (Ont. S.C.J.); *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.); *Caron v. Caron* (2023), 87 R.F.L. (8th) 1 (Alta. K.B.).

3. **Use the *St-Jean* factors:** While not exhaustive or determinative, these factors provide a useful roadmap for argument and help anticipate the recipient's counterarguments.

4. **Never lose sight of what is actually in dispute:** Spousal support cases involve multiple issues — entitlement, incomes, imputation, SSAG range, duration — but at the end of the day, the real questions are:

- How much will the payor actually pay after tax?

- How much will the recipient actually receive after tax?

- Sometimes, when you step back and crunch the numbers, the difference is not worth fighting over. If both sides can accept that support will end eventually, it might make sense to cut a deal rather than fight over a few extra years.

5. **Don't claim a payor in their 60s retired "too early" without evidence.** If you want to argue that someone who has worked 35 to 40 years and has grown children is too young to retire, bring expert evidence or some compelling proof. Otherwise, expect the argument to fall flat.

As these cases show, timing, reasonableness, and strategy matter.

End of Document