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

Aaron Franks & Michael Zalev

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Retirement Arrives, Support . . . Survives?

***Chemilnisky v. Chemilnisky* (2024), 8 R.F.L. (9th) 263 (Alta. K.B.) — Mandziuk J.**

Issues: Alberta — Variation of Spousal Support on Retirement

Most payors think that when they retire, they can finally put an end to support payments. But in family law, retirement doesn't always mean the end of the financial obligations. Even after a career comes to a close, support obligations may persist — though often at a reduced rate. And that's exactly what happened in *Chemilnisky*, where the court took into account the payor's retirement, health issues, and the recipient's ongoing financial need in determining a continued, though modified, support arrangement.

The parties were married for 21 years before separating in 2010. At the time of separation, the husband was employed as a teacher, earning approximately $90,000 per year. The wife worked as a section host for the Edmonton Oilers, earning roughly $30,000 annually. (She certainly had the more entertaining job.)

The parties' 2014 Divorce Judgment incorporated Minutes of Settlement that resolved all property issues — including the division of the husband's pension — and required the husband to pay spousal support of $2,000 per month. The settlement also included a clause stating that, "spousal support shall be reviewable upon application to the court by either party, based upon a material change in circumstances, after December 31, 2015, even if the material change occurred prior to December 31, 2015."

Quick Practice Point: When drafting spousal support terms, be careful not to conflate a **review** with a **variation**. As discussed in *A Review of Reviewing Reviews* (*TWFL*, May 27, 2024 (2024-20)), a **variation** under s. 17 of the *Divorce Act* requires a *material change in circumstances* — a change that, if known at the time of the original order, would likely have resulted in different terms; and a change, without which, the variation inquiry can go no further: *Litman v. Sherman* (2008), 52 R.F.L. (6th) 239 (Ont. C.A.); *Persaud v. Garcia-Persaud* (2009), 81 R.F.L. (6th) 1 (Ont. C.A.). A **review**, on the other hand, allows a court to revisit the order upon the occurrence of a specific triggering event or the passage of time, *without* the need for a material change.

In *Chemilnisky*, the parties' Divorce Judgment stated that spousal support would be "reviewable" in the event of a material change in circumstances. While this language did not ultimately affect the outcome, it was both incorrect and unnecessarily confusing. A review and a variation are distinct legal processes — conflating them, as the parties did here, risks significant interpretive issues. The likely intent was to make support non-variable until December 31, 2015, and thereafter subject to variation on the basis of a material change — even if that change predated the variation date. But that intention was expressed ambiguously, and in another case, such drafting could materially affect the outcome.

Fast forward to 2024. The husband, now 65, had retired and saw his income drop to approximately $53,000 per year, consisting primarily of his teacher's pension and CPP. He also suffered from health conditions, including osteoarthritis. The wife, now 69, faced her own health issues — rheumatoid arthritis, osteoarthritis, and coronary artery disease. Her income remained modest, at around $35,000 annually, which included a small amount of employment income, CPP, and OAS. However, this figure did not account for the $2,000 per month she continued to receive in spousal support, nor the funds available to her through withdrawals from the LIRA she received as part of the pension division under the 2014 property settlement. More on this below.

The husband brought an application to terminate spousal support, relying on his retirement and resulting income reduction as a material change in circumstances. He also argued that continued support would constitute impermissible "double dipping", as his pension had already been divided in the 2014 equalization and should not now form the basis of ongoing support obligations. (For the record, we prefer the term "double counting"; "double dipping" sounds like something at Dairy Queen.)

The wife opposed the application on two grounds. First, she argued that there had been no material change, as the husband's retirement was both foreseeable and voluntary. Second, and in the alternative, she submitted that even if a material change had occurred, this was an appropriate case for limited "double dipping." She maintained that she continued to have a demonstrated need, and that the husband — whose net worth was estimated at approximately $660,000, compared to her own net worth of about $270,000 — retained the ability to pay support.

The Test

As we discussed in *The Retirement Edition (Now with 100% Less Payments!)* in the March 17, 2025 (2025-10) edition of *TWFL*, a court faced with a request to vary spousal support must consider two questions. First, has there been a material change in circumstances — defined as a change that, if known at the time of the original order, would likely have resulted in different terms (*Droit de la famille - 09668* (2011), 6 R.F.L. (7th) 1 (S.C.C.) at para. 25).

Second, if the court is satisfied that a material change has been established, it must then limit the variation to what is appropriate in light of that change, and must not treat the matter as a fresh application for support (*Droit de la famille - 09668* (2011), 6 R.F.L. (7th) 1 (S.C.C.) at paras. 47-50).

At the first stage of the test, and despite the wife's submissions to the contrary, *foreseeability* is not relevant to the material change inquiry/analysis. As Justice Mandziuk clarified, whether a change was anticipated or foreseeable does not affect whether it meets the threshold for a material change.

> [49] **The material change test depends, not on foreseeability, but on what was actually contemplated in the initial order:** *Dedes v Dedes*, 2015 BCCA 194 at para 25; *Stones v Stones*, 2004 BCCA 99 at paras 15-16. . . .
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> [51] For example, in *Salt v Salt*, 2019 ABQB 595 [*Salt*], Kirker, J (as she then was) found that a reduction in income occasioned by the payor's retirement amounted to a material change in circumstances: at para 73. The Court rejected the recipient's argument that the payor's retirement was not a material change simply because his eventual retirement was foreseeable at the time of the initial order: *Salt* at paras 70-73. Kirker, J found that the parties' divorce judgment and corollary relief order contemplated variation of the duration of spousal support payments, and the only thing it prohibited was the payor claiming spousal support from the recipient: *Salt* at paras 71-72. [emphasis added]

Justice Mandziuk also set out a helpful list of principles to guide the assessment of whether retirement constitutes a material change for spousal support purposes, including:

> 1. "Retirement is not always a material change justifying variation of spousal support": *Boston v. Boston* (2001), 17 R.F.L. (5th) 4 (S.C.C.) at para. 61.

2. " . . . the question is whether, on retirement, the payor's ability to pay support has been compromised": *Boston v. Boston* (2001), 17 R.F.L. (5th) 4 (S.C.C.) at para. 61.

3. " . . . courts should not interfere with a person's decision to retire from a life-long career absent exceptional circumstances as retirement is a personal matter": *Norrish v. Norrish* (2015), 63 R.F.L. (7th) 288 (Alta. Q.B.) at para. 39.

4. "Courts may be reluctant to find a material change in circumstances when a payor opts to retire early. The question is whether it amounts to intentional underemployment": *King v. King*, 2011 CarswellAlta 568 (Q.B.) at para. 29.

5. "'Early retirement' is determined on a case-by-case basis, depending on the facts in evidence. Thus, there is no single jurisprudential definition. However, the [Revised Users Guide for the Spousal Support Advisory Guidelines] (at 101) defines retirement as early where: (1) the party is on a reduced pension; or (2) the party retires before age 65. If the payor voluntarily retires early and the Court finds it unnecessary or unreasonable, then spousal support will likely remain unchanged[.]"

6. "Early retirement or intentional underemployment may constitute a material change in circumstances if the payor retires early with the sole intention of reducing support payments": *Taylor v. Taylor* (2009), 72 R.F.L. (6th) 249 (Alta. C.A.) at para 12.

7. "Where courts have found early retirement insufficient to establish a material change, the payor's motive for ceasing employment was a central consideration": *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.) at para. 55.

8. Early retirement is generally accepted as a material change where it is justified by health issues, economic uncertainty, or lay-offs: RUG at 102,

9. "Occasionally, courts may find the payor's decision to retire early reasonable but impute part-time employment income to the early retiree to supplement their pension income up to the amount of their pre-retirement income."

In this case, Justice Mandziuk rejected the wife's arguments that the husband's retirement was not a material change because it was foreseeable and/or unreasonable. As noted earlier, foreseeability is irrelevant to the material change analysis. Moreover, in light of the husband's age and health conditions, his Honour was not prepared to second-guess the husband's decision to retire.

> [64] This is not an early retirement case. **[The husband] retired at the age of 65 after a 28-year career with Edmonton Public Schools. It was not an unreasonable decision.** As the Court in *Norrish* suggested, **courts should not interfere with a decision to retire except in exceptional circumstances. No such exceptional circumstances exist in this case.** There is no evidence that suggests the [husband] is retiring with the intent to flout his spousal support obligations.
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> [66] **I accept the [husband's] evidence that his ability to work is diminished**, reinforcing the reasonableness of his choice to retire at the regular retirement age. Unlike the payor in *Norrish*, **the [husband] has provided some medical evidence to support his contention that he has developed health issues**, though the full implication of those health issues is not apparent on the evidence. **Even if the [the husband] has some capacity to continue working, as was the case in *Bone [v. Bone*, 2020 ABCA 323] and *Schulstad [v. Schulstad*, 2017 ONCA 95], I do not find exceptional circumstances exist here such that the Court should interfere with the [husband's] decision to retire at age 65**. [emphasis added]

Accordingly, having found a material change, Justice Mandziuk proceeded to determine the appropriate variation. After reviewing the evidence, his Honour was satisfied that the 10 years of spousal support already paid, coupled with the equal division of property, had addressed the compensatory aspects of the wife's support claim.

However, his Honour also concluded that the wife remained entitled to non-compensatory support. He found that the wife did not have sufficient income or assets to meet her reasonable expenses without support from the husband. Crucially, there was no evidence to suggest that she had been imprudent with her finances since separation, and she continued to experience health challenges that impaired her self-sufficiency.

Accordingly, the support relationship had now shifted from compensating for marital disadvantage to alleviating the wife's ongoing economic hardship.

As for the husband's double-counting argument, Justice Mandziuk found this case distinguishable from *Boston*. In *Boston*, the payor kept the entire pension and paid an equalization amount based on its value. Here, the husband's pension was divided at source, with the wife's share transferred into a LIRA in her name. This approach avoids double-counting: each party includes their pension income in the calculation, and the previously divided portions effectively cancel each other out:

> [105] ***Boston* applies when a pension is not divided at source; the recipient received other assets in lieu of their actual share of the pension:** RUG at 103-04; see also *Nykolyshyn v Dalton*, 2022 ABKB 860 at paras 212-13. As mentioned, in the *Boston* case the pension was not actually divided during the matrimonial property settlement. Rather, it was equalized: the payor retained the pension in its entirety and the recipient received assets of equal value in its place.
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> [107] **Where the equalization entails the pension being divided at source, the issue of double recovery is generally avoided:** RUG at 104, referencing *Trewern v Trewern,* 2009 BCSC 236 [*Trewern*]. Unlike in *Boston*, the Court in *Trewern* found that as the pension had been divided at source during the initial equalization, the payor had not "bought out" the recipient's interest in the payor's pension in exchange for equally valued assets: at paras 19-20. **In cases where the pension was divided at source, the double-dipping issue can be avoided as the parties simply include the pension payments into their income calculations and the previously divided portions cancel out:** RUG at 104. [emphasis added]

Because the wife didn't include any income from her LIRA in her financial disclosure, Justice Mandziuk imputed $5,000 per year to her from that source. Why $5,000? The decision doesn't clearly say, and it feels a bit light — especially since the LIRA was worth about $150,000 and the wife was 69. Even with no investment growth, drawing just $5,000 a year would stretch the fund to age 99 (that's a lot of Oilers games). Still, in context, it's a reasonable rough-justice estimate — a "good enough" number given the evidence before the court.

Using incomes of $53,000 for the husband and $39,000 for the wife (including the imputed LIRA income), the SSAGs produced a monthly range of $350 to $450 (rounded). Justice Mandziuk went with the high end, pointing to the wife's financial needs and ongoing health issues. He ordered $450 per month in support for 10 more years, at which point the husband would have paid support for a period roughly equal to the length of the marriage.

The takeaway from *Chemilnisky* is that retirement at 65, especially when accompanied by health concerns and absent evidence of improper intent on the part of the payor, will generally be considered a material change in circumstances justifying a variation in support. However, the payor's retirement and the finding of a material change does not automatically terminate support. In cases where the recipient continues to have financial needs, even after retirement, a reduced support obligation may still be justified.

This seems to be the way the law is going; and we think it's a fair direction.

Unauthorized Use of Computer Self-Engineered Status Quo

***Caniga v. Thwaites* (2024), 12 R.F.L. (9th) 454 (Ont. S.C.J.) — Tweedie J.**

Issues: Ontario — AFCC-O Parenting Plan Guide

The issue in *Caniga* was decision-making and parenting time for the parties' two-year-old daughter. Justice Tweedie's ultimate Order departed from the mother's self-imposed *status quo*. Even more interesting (and instructive), however, is the court's departure from the Association of Family and Conciliation Courts — Ontario Chapter (AFCC-O)'s Parenting Plan Guide in favour of a parenting schedule that gave the father immediate and extended overnight time. This serves as a reminder that, despite what some have been suggesting — the AFCC-O Parenting Plan Guide is just that — a *Guide*. See our previous comments as to this in the September 19, 2022 (2022-34) and the June 27, 2022 (2022-23) editions of *TWFL*.

The parties began cohabiting in or around July 2021. Their daughter was born on March 8, 2022. They separated on May 29, 2022, after the father took their daughter to visit his family without the mother's knowledge.

After separation, the child lived with the mother and initially saw the father for a daytime visit once a week, as unilaterally determined by the mother. By October 2022, however, the parties were spending more time together, and the father was enjoying parenting time every other weekend from Friday to Sunday. However, this parenting schedule was inconsistent, and the mother would unilaterally change or suspend it when she was upset with the father.

On February 23, 2023, things went south — like Antarctica south. The mother claimed she had made plans to spend Family Day with the father and the child, but when she could not reach the father at his home, she did what any level-headed person would do: she went to the father's home and accessed his computer. She was charged with breaking and entering and unauthorized use of a computer on February 24, 2023 — and *convicted* on June 10, 2024. Yes, *convicted*. You might want to direct your clients who are inclined to "review" things they are not supposed to be reviewing to s. 342.1 of the *Criminal Code*: Unauthorized Use of a Computer — a summary conviction offence, or an indictable offence subject to imprisonment for a term of not more than **10 years** — 10 years!

The mother's criminal conditions prohibited her from contacting the father and being within 100 metres of any place she knew the father would be unless pursuant to a court order or through legal counsel for parenting arrangements.

After the mother's arrest, the father tried to arrange for parenting time through the maternal grandparents. He was not successful. When the mother commenced proceedings on March 12, 2023, the father still had not had any parenting time, so he brought an urgent motion. On June 13, 2023, Justice Madsen (as she then was), on consent, reinstated the father's parenting time of alternate weekends and each Wednesday from 5:30 to 8:00 p.m.

While the parties settled most parenting issues, they could not agree on decision-making responsibility and proceeded to trial.

The mother sought sole decision-making responsibility after consulting with the father on all major decisions. She proposed that the father have step up parenting time as follows:

> • Commencing October 1, 2024, every Wednesday from 5 p.m. to 7 p.m., and on alternating weekends from Friday at 5 p.m. to Sunday at 7 p.m.;
>
> • Commencing January 1, 2025, every Wednesday at 5 p.m. to Thursday at 8:30 a.m., or drop off to daycare, and on alternating weekends from Friday at 5 p.m. to Sunday at 7 p.m.;
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> • Commencing January 1, 2026, every Wednesday at 5 p.m. to Thursday at 8:30 a.m., or drop off to daycare, and on alternating weekends from Thursday at 5 p.m. to Sunday at 7 p.m.

The father, however, sought joint decision-making for the child and that he have parenting time during week one from Wednesday end of daycare/school, or 5:00 p.m., until Friday morning at the start of daycare/school or 7:00 a.m. and, during week two, Wednesday from end of daycare/school, or 5:00 p.m., until Friday morning at the start of daycare/school or 7:00 a.m. as well as Friday from the end of daycare/school, or 5:00 p.m., until Monday morning at the start of daycare/school or 7:00 a.m.

The mother's credibility and conduct during the trial were an issue. In contrast, Justice Tweedie found the father to be a credible witness and preferred his evidence.

Justice Tweedie began her analysis by reiterating that, pursuant to s. 20 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"), a child's parents are equally entitled to decision-making responsibility. Justice Tweedie then set out the remaining applicable law concerning a child's best interests.

The father argued that his proposal for parenting time was consistent with s. 24(6) of the *CLRA*, which states that in allocating parenting time, the court shall give effect to the principle that a child should spend as much time with each parent as is consistent with the child's best interests.

The mother argued that the child's young age required her to be the primary caregiver and that maintaining the *status quo* would promote stability for the child. The mother further argued that the child, because of her young age, was unable to transition back and forth between the parties' homes without significant disruption to her mood and demeanour. This sounds dangerously close to arguing the long-since-abandoned "Tender Years Doctrine": *Hildinger v. Carroll*, 1998 CarswellOnt 2873 (Gen. Div.); *Warcop v. Warcop* (2009), 66 R.F.L. (6th) 438 (Ont. S.C.J.); *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.); *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.).

Referencing the AFCC-O Parenting Plan Guide Version 2.0 (the "Guide"), the mother argued that the father's then-current parenting time was appropriate for a two-year-old who has previously had limited parenting time with her father.

As have many courts before her [see, for example: *L. v. B.* (2021), 63 R.F.L. (8th) 382 (Ont. S.C.J.); *P.P. v. A.V.*, 2021 CarswellOnt 15915 (S.C.J.); *Saunders v. Ormsbee-Posthumus*, 2020 CarswellOnt 5163 (S.C.J.); *J.N. v. A.S.*, 2020 CarswellOnt 12748 (S.C.J.); *H. v. A.* (2022), 69 R.F.L. (8th) 18 (Ont. S.C.J.); *Melbourne v. Melbourne* (2022), 72 R.F.L. (8th) 84 (Ont. S.C.J.); *A.C. v. K.C.*, 2023 CarswellOnt 16616 (S.C.J.); *E.M.B. v. M.F.B.*, 2021 CarswellOnt 8802 (S.C.J.); *Hatab v. Abuhatab* (2022), 69 R.F.L. (8th) 18 (Ont. S.C.J.); *McBennett v. Danis* (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.); *Czyzewski v. Fabro* (2022), 77 R.F.L. (8th) 385 (Ont. S.C.J.); *Gerling v. Gerling* (2024), 99 R.F.L. (8th) 445 (Ont. S.C.J.)], Justice Tweedie described the Guide as a summary of research on children's needs at various ages and as providing guidance on what types of parenting arrangements might meet those needs.

However, while Justice Tweedie highlighted the value of the Guide for parties and to the court, she also provided the following caution, emphasizing that the Guide is just that — a *guide*:

> [67] **However, the court must be cautious and not use the Guide as a *default position*.** The Guide should be used as reference tool only when determining the best interests of the child, an analysis which must also include a thorough consideration of the cognitive and social development, temperament, needs, and history of the specific child before the court, together with an analysis of the history of family dynamics. [emphasis added].

In this case, Justice Tweedie concluded that the child was already spending weekend overnights in the father's care and had historically spent time with several different caregivers without any documented issues. And there was no evidence of disruptions caused by transitions from one parent's care to the other's care.

It was clear to Justice Tweedie that the child had a good relationship with both parents and that both parents loved their daughter. Justice Tweedie felt that each parent could provide appropriate care to the child and was equally skilled in meeting the child's day-to-day needs. Accordingly, Justice Tweedie concluded that a graduated increase was neither necessary for the child's best interests nor consistent with the principle set out in s. 24(6) of the *CLRA*.

Justice Tweedie adopted the father's proposed schedule — less one overnight — setting his parenting time as:

> • Week one: Wednesday from the end of daycare/school, or 5:00 p.m., until Friday morning at the start of daycare/school or 7:00 a.m.
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> • Week two: Wednesday from the end of daycare/school or 5:00 p.m., until Thursday morning at the start of daycare/school or 7:00 a.m.; and Friday from the end of daycare/school or 5:00 p.m., until Monday morning at the start of daycare/school or 7:00 a.m.

The mother argued that she had been the sole decision-maker for the child since her birth, and that the *status quo* should continue. Justice Tweedie did not accept this, noting that this was a *status quo* that the mother had manipulated or self-engineered. She had never involved the father in decision-making but "gatekeeps information about the child" and then unilaterally imposed her expectations on the father. And a self-engineered *status quo* is no *status quo* at all: *Hsu v. Liu*, 1999 CarswellOnt 2651 (S.C.J.); *Weinrauch v. Weinrauch*, 1998 CarswellAlta 1199 (Q.B.); *Greve v. Brighton*, 2011 CarswellOnt 8814 (S.C.J.); *Horton v. Marsh*, 2008 CarswellNS 371 (S.C.); *Walker v. Walker*, 2004 CarswellNS 167 (S.C.); *Gibney v. Conohan* (2011), 10 R.F.L. (7th) 461 (N.S. S.C.); *Izyuk v. Bilousov*, 2011 CarswellOnt 12097 (S.C.J.); *Jochems v. Jochems*, 2013 CarswellSask 512 (C.A.); *D.J. v. D.L.* (2009), 63 R.F.L. (6th) 30 (P.E.I. C.A.); *Miller v. White* (2018), 10 R.F.L. (8th) 251 (P.E.I. C.A.); *Roman-Manarovici v. Manarovici* (2022), 74 R.F.L. (8th) 316 (B.C. S.C.); and *Munro v. Munro* (2023), 91 R.F.L. (8th) 72 (Ont. S.C.J.).

Justice Tweedie concluded that the mother was not fully supportive of the child's relationship with the father and did not fully recognize the importance of the father's involvement in the child's life. The mother did not involve the father in the decisions about the child, such as medical appointments or daycare. There was a pattern of her limiting and withholding the father's time with the child. The father, on the other hand, for the most part, was respectful and child-focused.

Her Honour was also concerned about the mother's consistent breach of her prohibition order, lack of remorse about the criminal incident, history of not honouring agreements about parenting time, and conduct throughout the trial. Consequently, Justice Tweedie was not satisfied that the mother would follow gradual access terms without incident.

Justice Tweedie concluded that there was sufficient evidence that the parties could make decisions together, including cooperating on exchanges and coordinating the child's toilet training, diet, and nutrition. There was no evidence that either parent had made or would make poor decisions for the child. Accordingly, Justice Tweedie ordered that the parties have joint decision-making responsibility for the child and will consult and confer in writing, unless otherwise agreed, on all major decisions affecting the child's well-being.

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