FAMLNWS 2026-28

Family Law Newsletters
August 03, 2026

— Franks & Zalev - This Week in Family Law

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Hey B.C. — Welcome to the Shifting Burden Club!

S.A. v. Z.R. **(2026), 25 R.F.L. (9th) 1 (B.C. C.A.) — Dickson, Horsman and Warren JJ.A**

With this appeal, the British Columbia Court of Appeal has ushered British Columbia into the "shifting burden club" when imputing income to payors.

The Husband worked in marketing and had been quite successful for *most* of the parties' marriage. Initially, the Husband worked overseas and traveled frequently for work, but this put a strain on the parties' relationship and the Husband's relationship with the three children. He took a job in Vancouver. There were a few more jobs, and at the time of trial, he was working as a consultant.

Prior to working as an independent consultant, the Husband had been working with a large company — but he resigned from that position in February of 2019, curiously around the time of separation. The Husband testified that while he was earning much less as a consultant, he had to resign to be more available to the parties' children who faced challenges and required a high degree of engagement by both parents.

At the time of trial, the parties' eldest daughter was attending university away from home.

The trial took place in 2024. The issues between the parties were the parenting arrangements, determination of income, child support, spousal support, property division, conduct orders and fines. But the main issue on appeal — and the one in which we are primarily interested — was the trial judge's determination of the Husband's income and her exclusion of post-secondary expenses from special and extraordinary expenses.

The trial judge believed the Wife to be credible and found aspects of the Husband's evidence to be problematic. While she accepted that the Husband had testified honestly, she found that the Husband's approach to disputes was not cooperative and that he would frequently prioritize his own needs.

The Wife argued that the Husband should be imputed an income of $400,000 based on his pre-2019 earnings. The Husband argued that his income should be his actual income for the years in question, being $176,725 (2022), $170,000 (2023) and $204,000 (2024). The Husband argued that his parenting responsibilities required him to work less than he had in the past. In addition, he claimed that the market in Vancouver was not as lucrative as it was internationally.

The trial judge determined that the Husband was not working to his full capacity and imputed income to him as "intentionally underemployed" pursuant to s. 19(1)(a) of the *Child Support Guidelines*, SOR/97-175. As a result, the trial judge imputed income to the Husband, but not at the level requested by the Wife:

> [160] In my view, the [Husband's] historical earnings and his role as the primary income earner require him to maintain a level of earning commensurate with pre-separation earnings. I do not accept that his efforts since separation have been reasonable. Particularly in light of his own testimony about his significant skill and ability in marketing. The authorities make clear that the Court is to assess reasonableness in determining whether to impute income to a litigant whose earnings have dramatically declined post-separation. As I consider the factors outlined in *Hanson*, including the [Husband's] age, education, considerable experience, skills, and health, plus such matters as "availability of work, freedom to relocate and other obligations," this is an appropriate case to impute income to the [Husband]. Consistent with *Hanson*, "persistence in underpaid employment may entitle the court to impute income. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction in income." **I have reviewed his testimony about what he has done to secure local employment. His testimony about the results of his job searches are inconsistent with the employment history and accolades he has described. He should be able to organize his employment such that he can incorporate some travel.** That should increase the prospects that he will find more lucrative remuneration in the near future. It is to be remembered that the [Husband] was able to advance professionally during the two decades of the parties' marriage. The economic advantage to him, as the primary earner for the family, requires him to find employment that is similar to his pre-separation employment. **He testified that he wishes to spend more time with the children who have been in crisis since the separation. In recognition of his aspiration in that regard, I have not imputed an income as high as that sought by the [Wife]. Rather, I have determined $325,000 is a realistic and appropriate figure. This number is less than his 2017 earnings. Allowing for inflation, this figure is realistic and, based on the employment evidence presented, attainable.** Taking into account the [Husband's] age, education, health, work history and work availability (adjusting the parameters in accordance with these reasons), in my view, the figure of $325,000 is a reasonable one.
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> [161] I also determine that the [Husband's] income for support purposes from June 2021 through 2023 is $325,000. This is considerably lower than the income sought by the [Wife] but higher than what the [Husband] has reported. **I have found that there was some basis for the [Husband] to adjust his work schedule slightly to accommodate the children's parenting needs in the short term. However, he needs to do more. In my view, $325,000 fairly reflects his considerable skill and talent in his chosen profession and also allows him to fulfil his parenting responsibilities.**
>
> [emphasis added]

The trial judge declined to order the Wife to contribute to the eldest child's post-secondary costs because, at that time, the paternal grandmother was paying those costs (and had paid them historically).

Finding that the Wife had strong entitlement to both compensatory and non-compensatory spousal support, spousal support was ordered at the "high" end of the SSAG range. Spousal support was ordered payable for 15 years, with the amount to be reviewed by October 1, 2025 and annually thereafter.

After the trial, at a post-trial Judicial Management Conference, the trial judge clarified it was her intention that an annual income of $325,000 would be imputed to the Husband on the future reviews.

The Husband appealed, arguing that the trial judge had erred in three respects:

1. The trial judge imputed income to the Husband without sufficient evidence to do so;

2. The trial judge erred by directing the settlement of the terms of the order concerning future reviews of spousal support in a manner that was inconsistent with her reasons for judgment; and

3. The trial judge excluded post-secondary special expenses without providing a rational basis for this exclusion.

The Court of Appeal first considered the trial judge's decision to impute income to the Husband.

Courtesy of s. 19(1)(a) of the *Child Support Guidelines*, courts have broad discretion to impute income — to either the payor or the claimant (yes — imputation of income is an equal opportunity exercise). In fact, it is has been held that it is a reversible

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error for a court *not* to impute income when the circumstances call for it: *Saunders v. Saunders* (2010), 88 R.F.L. (6th) 363 (N.S. S.C.), rev'd (2011), 7 R.F.L. (7th) 265 (N.S. C.A.); *Ladisa v. Ladisa* (2005), 11 R.F.L. (6th) 50 (Ont. C.A.); *Jendruck v. Jendruck* (2014), 50 R.F.L. (7th) 23 (B.C. C.A.); *Lavie v. Lavie* (2018), 8 R.F.L. (8th) 14 (Ont. C.A.).

For those that do not have it memorized (or tattooed somewhere easily accessible), we offer you s. 19(1) of the *Child Support Guidelines*, and its non-exhaustive list of the circumstances when income can be imputed:

> **19 (1)** The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> **(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage** or any child under the age of majority or by the reasonable educational or health needs of the spouse . . . [emphasis added]

There is no requirement that the referenced intention be to evade or minimize support. The only question is whether the individual is earning what they are capable of earning: *Barker v. Barker* (2005), 15 R.F.L. (6th) 43 (B.C. C.A.) at para. 19; *Peters v. Atchooay*, 2022 CarswellAlta 3110 (C.A.). A party's personal goals, life-style choices and desire for self-actualization do not take priority over their support obligation: *Hanson v. Hanson*, 1999 CarswellBC 2545 (S.C.) at para. 9. Quite simply, a party must earn what they are capable of earning, given their age, education, health, work history and work availability: *Barker v. Barker* (2005), 15 R.F.L. (6th) 43 (B.C. C.A.); *Khurana v. Khurana* (2011), 7 R.F.L. (7th) 251 (Alta. C.A.); *Beissner v. Matheusik*, 2015 CarswellBC 1848 (C.A.); *Lawson v. Lawson* (2006), 29 R.F.L. (6th) 8 (Ont. C.A.); *K.P.B. v. A.S.R.*, 2016 CarswellBC 2611 (C.A.); *Beissner v. Matheusik*, 2015 CarswellBC 1848 (C.A.); and *Donovan v. Donovan* (2000), 9 R.F.L. (5th) 306 (Man. C.A.) at para. 20.

But who has to prove it?

This was the heart of the appeal — which party had the burden to establish an evidentiary basis for a finding under s. 19(1)(a) of the *Child Support Guidelines* that a spouse's under-employment or unemployment is required by the needs of a child of the marriage or by the spouse's reasonable educational or health needs?

There has been no dispute across the country that the party seeking to impute income based on intentional under-employment has the burden of both *establishing an evidentiary basis* for such a finding and *showing that the amount they seek to impute has a rational basis grounded in the evidence* and is not arbitrary: *Horbas v. Horbas* (2020), 37 R.F.L. (8th) 1 (Man. C.A.) at para. 39; *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.); *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *Chiasson v. Doucet*, 2014 CarswellNB 367 (C.A.); *H.D. v. D.D.* (2015), 62 R.F.L. (7th) 261 (Ont. C.A.); *Marquez v. Zapiola* (2013), 36 R.F.L. (7th) 22 (B.C. C.A.); *Jendruck v. Jendruck* (2014), 50 R.F.L. (7th) 23 (B.C. C.A.); *MacCarthy v. MacCarthy* (2015), 69 R.F.L. (7th) 253 (B.C. C.A.); and *Arlt v. Arlt*, 2003 CarswellSask 751 (Q.B.) at para. 11.

This burden can be met in many ways:

> [51] The party seeking to impute income may discharge their burden to show intentional under-employment or unemployment through the financial disclosure of the other party. For example, a *prima facie* case for the imputation of income may be established where the evidence — regardless of who adduced it — shows that a party has made a voluntary employment decision that has led to a large drop in income: *Peters v. Atchooay*, 2022 ABCA 347 at para. 78; *Horbas v. Horbas*, 2020 MBCA 34 at para. 34. As a general rule, a parent with the capacity to earn a higher income cannot avoid child support obligations by a self-induced reduction of income: *Hanson* at para. 14, citing Julien D. Payne, *Child Support in Canada*, Danrab Inc., August 3, 1999.

That was not the issue.

The contentious question was — once underemployment has been established, who has the burden to prove whether one or more of the exceptions in s. 19(1)(a) apply or not? The Wife argued that, where a party seeks to bring themselves under one of the exceptions under s. 19(1)(a), they have the burden to show a basis for such an exception in the evidence. The Husband,

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on the other hand, argued that the evidentiary burden is on the party looking to impute income to establish both that the other party is not working to capacity and that their unemployment or under-employment is not required by the needs of the children or their reasonable educational or health needs.

To answer this question, the Court of Appeal considered how other jurisdictions have approached this problem:

> [54] In *Drygala v. Pauli*, 61 O.R. (3d) 711, 2002 CanLII 41868 (C.A.), the Ontario Court of Appeal addressed the imputation of income in the context of a spouse who chose to enrol in a full-time university program. The Court held, consistent with the law in British Columbia, that a specific intent to avoid child support obligations was not required before income could be imputed under s. 19(1)(a) of the *Child Support Guidelines*. The Court noted that in this case the spouse was intentionally unemployed within the meaning of s. 19(1)(a) when he chose to enrol in a full-time educational program rather than work. The question then became whether his unemployment was required by his "reasonable educational needs". On this point, the Court reasoned:
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> > [38] There is a duty to seek employment in a case where a parent is healthy. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income. **Thus, once it has been established that a spouse is intentionally unemployed or under-employed, the burden shifts to that spouse to establish what is required by virtue of his or her reasonable educational needs.**
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> [55] The Manitoba Court of Appeal adopted the same approach in *Horbas*. In this case, the husband worked in the pipeline industry during the marriage, earning a steadily increasing income in jobs that required him to work outside of Manitoba. After separation, the husband changed employment so that he could remain at home and be available to his children. His income dropped dramatically. The Court found that this was sufficient to establish a *prima facie* case for the imputation of income:
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> > [34] One of the striking aspects of this case is the lack of evidence by the husband regarding his income-earning situation. **Indeed, once a party seeking the imputation of income presents the evidentiary basis suggesting a *prima facie* case for imputation of income (established here by the sheer drop in income), the onus shifts to the individual seeking to defend the income position he or she is taking** (see Payne at page 175). . . .
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> [56] To similar effect, see: *Peters* at para. 92; *Pellegrini v. Tkach*, 2023 SKCA 85 at para. 44; and Payne, *Canadian Family Law* at 98.
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> [57] While this Court has not directly addressed the onus point to date, the holding in cases such as *Drygala* is consistent with the general principles that govern the imputation of income that have been accepted in this jurisdiction. In *Barker*, for example, this Court commented on the imputation of income for unemployment and under-employment in these terms:
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> > [18] Under s. 19(1)(a) of the *Guidelines*, the important question is whether the payor spouse has demonstrated an intention to be underemployed, with the consequence that his children do not benefit from his potential earning capacity. This does not mean a parent must work the long hours Ms. Barker puts in to earn her significant income. It does mean that **a parent who chooses to work less than a regular work week must justify that choice by the needs of the children or suffer the loss personally. He cannot effectively transfer part of the cost of that choice to his children.** Those principles are evident in the language of the provision . . .
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> [58] Finally, I note that *Drygala* has been applied in several decisions of the Supreme Court of British Columbia in support of the proposition that the evidentiary burden shifts once the party seeking to impute income has established under-employment or unemployment. See for example: *McNaught v. Friedman*, 2011 BCSC 524 at para. 88; *D.E.A. v. A.L.B.*, 2024 BCSC 161 at para. 26; *Bishop v. Wang*, 2018 BCSC 781 at para. 125.

And for our friends on the East coast: *Drover v. Drover*, 2020 CarswellNfld 56 (C.A.).

In the end, the British Columbia Court of Appeal decided this was a club to which B.C. should belong. And what a fine club it is. Therefore, in B.C., once a party establishes that a spouse is intentionally under-employed or unemployed, the evidentiary

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burden shifts to the underemployed/unemployed spouse to demonstrate that the underemployment/unemployment is required by one of the circumstances listed in s. 19(1)(a) of the *Child Support Guidelines*.

Applying this theory to the present case, there was no indication that the trial judge had failed to consider the Husband's parenting responsibilities. She had explicitly acknowledged them and cited them as the reason why she declined to impute income at a level requested by the Wife. Further, while the Husband had testified that the Vancouver market was not as lucrative, he had not actually adduced any evidence to support that statement. But he had adduced considerable evidence as to his achievements, skills and intellect prior to 2019 — sometimes tooting one's own horn is not such a good idea.

In light of the evidence of the Husband's employment history, his value and skills as an employee and the flexibility of his various income arrangements, it was open to the judge to reject his claim that he was working at capacity.

On the issue of the trial judge not ordering the Wife to contribute to post-secondary expenses, the Court of Appeal found no error. When the trial judge declined to order the Wife to contribute to the eldest child's post-secondary costs, she did so because the paternal grandmother was, at that time, covering them. Courts have discretion to exclude section 7 expenses — the *Guidelines* are clear that a court "may" include such expenses. While the Husband argued that there was no assurance that his mother would continue to finance post-secondary costs, this was ultimately not relevant. The trial judge's reasons did not assume that post-secondary costs would be excluded indefinitely. If and when those expenses were no longer covered by the paternal grandmother, it would be open for the Husband to argue that there had been a material change in circumstances.

So welcome to the club, British Columbia. Now you, too, can enjoy sandwiches with little frilly toothpicks.

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